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MICHAEL RODAK, JR.

No. 74-1229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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March 1975

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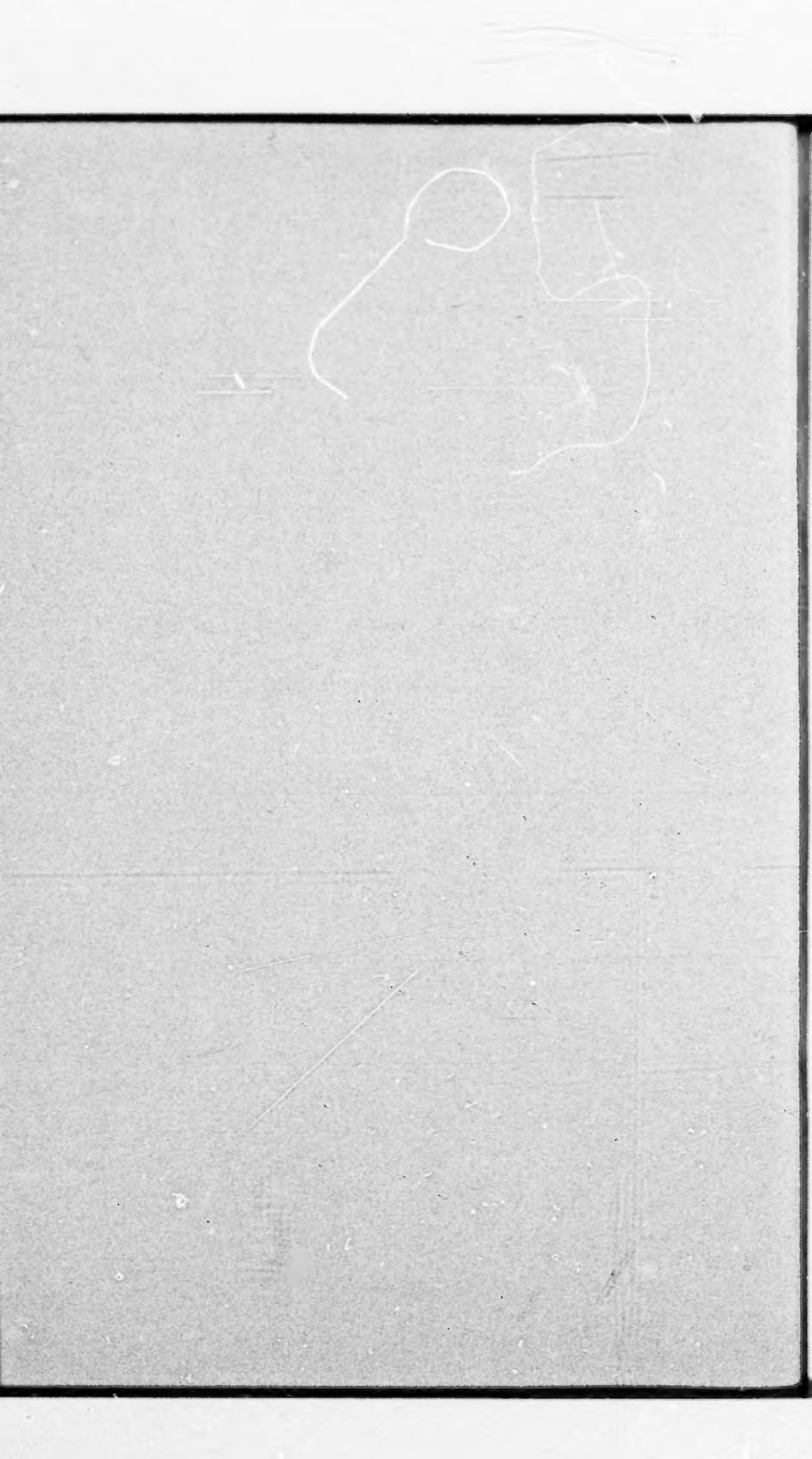

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners American Telephone and Telegraph Company ("AT&T"), *et al.* ("the Bell System") request that this Court issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit entered in this case.[1]

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[1] Apart from AT&T, the petitioners are telephone operating companies included in the Bell System, which were parties in the court below and are directly affected by the outcome of this case: The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, Cincinnati Bell, Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, Mountain States Telephone and

OPINIONS BELOW

The decision of the Court of Appeals, which is reported at 503 F.2d 1250, appears at Appendix A to this petition.[2] The decision of the Federal Communications Commission, which is reported at 46 F.C.C.2d 413, appears at Appendix B.

JURISDICTION

The judgment of the Court of Appeals, which appears at Appendix C, was filed on September 11, 1974. A timely filed petition for rehearing was denied on October 30, 1974, by an order which appears at Appendix D. By order of January 14, 1975, Mr. Justice Brennan extended the time to file this petition to and including March 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In the FCC decision affirmed by the Court of Appeals, the FCC—without an evidentiary proceeding of any kind—issued a cease and desist order requiring the Bell System to physically connect the facilities of so-called "specialized carriers" into the Bell System's switched telephone network. The FCC also summarily

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Telegraph Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, Northwestern Bell Telephone Company, The Ohio Bell Telephone Company, Pacific Northwest Bell Telephone Company, The Pacific Telephone and Telegraph Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, The Southern New England Telephone Company, Southwestern Bell Telephone Company, and Wisconsin Telephone Company.

[2] The appendices are separately bound in a companion volume, which is cited as "Pet. App."

rejected, without the normal statutory hearing or findings, newly filed Bell System tariffs so far as they replaced contracts between the Bell System and Western Union Telegraph Company ("Western Union"). The questions presented are:

1. Whether the lower court erred in holding that the FCC could order such physical connection without any type of evidentiary proceeding, where Section 201(a) of the Communications Act requires an opportunity for hearing, the Bell System raised substantial and material questions of fact to show that such physical connection could adversely affect and endanger the switched telephone network, and the FCC has heretofore allowed submission of evidence in previous but far less important cases under Section 201(a).

2. Whether the Court of Appeals and the FCC violated the rule of *Morgan* v. *United States,* 304 U.S. 1 (1938), that a party must be "fairly advised" of proposed government action so that it may be heard in opposition, because both the lower court and agency in this case premised the physical connection order in substantial part on the FCC's earlier *Specialized Carrier* decision (see p. 7, below) even though the Bell System had no warning in that proceeding that physical connections with the switched network were ever contemplated.

3. Whether the FCC's summary rejection of Bell System tariffs on grounds of conflict with prior Bell System-Western Union contracts was inconsistent with the doctrine of *Armour Packing Co.* v. *United States,* 209 U.S. 56 (1908), recently followed by the Court of Appeals for the Fourth Circuit,[3] that under the Inter-

[3] *Cincinnati, N.O. & T.P. Ry.* v. *Chesapeake & O. Ry.,* 441 F.2d 483 (1971).

state Commerce Act (on which the Communications Act is based) a tariff filing automatically overrides a prior contract.[4]

STATUTES INVOLVED

Pertinent provisions of the Communications Act, the Interstate Commerce Act, and the Natural Gas Act appear at Appendix E.

STATEMENT OF THE CASE

A. The Switched Network Dispute

This case involves a fundamental challenge, on both statutory and due process grounds, to the summary legal procedures that the Federal Communications Commission employed in ordering the Bell System to physically connect facilities of so-called specialized carriers into the interstate switched message telephone network ("the switched network"). It also presents the related question whether, under this Court's decisions governing the fairness of administrative proceedings, the FCC could properly rely in making its order on an earlier FCC proceeding where physical connection with the switched network clearly did not appear to be an issue. To understand the context in which these central legal questions are raised, a brief understanding of the switched network and the background of this dispute is useful.

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[4] If certiorari is granted, petitioners may present two related questions involving alternative bases for reversal, namely: whether the FCC's physical connection order is substantively invalid under *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), and whether the order is impermissibly over-broad, under decisions of this Court, in seeking to impose an undefined obligation with respect to unknown services which specialized carriers may hereafter offer. These questions, which are related to the primary questions presented, are discussed briefly at pp. 13, 22, below.

The Switched Network and the Original Role of the Specialized Carriers. For many years AT&T has managed the planning and operation of the interstate switched message telephone network that provides the essential "switched" telephone services used by millions of Americans every day.[5] "Switched" services require that a new circuit path be established for each call through switching machines located at telephone exchanges and (for long distance calls) at toll switching centers. The network is a finely balanced and interdependent entity including over 23,000 switching systems and over 350 million circuit miles of transmission lines, linking more than 80 million main station telephones throughout the country. Tr. 16 (A. 880).[6]

AT&T's centralized management of the interstate telephone network has enabled it to protect against unusual demand or natural calamity by arranging alternative routings for calls and by providing back-up switching and transmission capacity. Through long-range planning of new facilities and the use of high capacity, low cost facilities, AT&T has also achieved major operating economies that could not be achieved if the responsibility for interstate telephone message transmission were fragmented among numerous com-

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[5] The most familiar switched services include "local exchange service," used for individual local telephone calls, "message telecommunications service" ("MTS"), which is ordinary long distance telephone service, and "wide area telephone service" ("WATS"), which is a related long distance service. The interstate services are provided on a partnership basis by AT&T, the Bell System operating companies and independent local telephone companies.

[6] References to "A." are to the Appendix in the lower court, containing the oral argument transcript, pleadings, and other pertinent FCC documents. A copy of the Appendix has been lodged with the Clerk of this Court.

peting entities. These economies achieved by AT&T have in turn resulted in substantial savings for telephone customers.[7]

Beginning in the mid and late 1960's, applicants now known as "specialized carriers" proposed that they be permitted to provide new types of point-to-point private line service—an existing communications service that involves no physical connection with the switched network.[8] Point-to-point private line service, which the Bell System has provided for many years, furnishes the user—typically one having a large volume of calls between two points—with an exclusive circuit or circuits for continuous communication between two or more locations without the need to establish a new circuit through switching machinery for each individual call.[9] Such point-to-point private line service essentially

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[7] Despite relentless inflation in other areas of the economy, interstate telephone rates have been reduced several times in the last twenty years. Even with the most recent increase in the wake of extremely high inflation, interstate long distance telephone rates are now at about the same level they were at in 1953.

[8] The original application of such a carrier to provide such point-to-point service between Chicago and St. Louis was approved in *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969), *reconsideration denied*, 21 F.C.C.2d 190 (1970). The decision stated that MCI's applications, in the Domestic Point-to-Point Radio Service, proposed a limited common carrier service "designed to meet the interoffice and interplant communications needs of small businesses." *Id.* at 953. It continued: "The proposed service would be limited to transmissions between MCI's microwave sites, making it incumbent upon each subscriber to supply his own communications link between MCI's sites and his place of business (loop service)." *Id.* at 953-54.

[9] For example, a private line telephone might be used to connect a company headquarters in New York with one of its factories in Boston. This would provide a continuously "open" circuit between the two cities. Apart from convenience, this could result in

bypasses the complex switching machinery which controls the switched telephone network.

Following its initial license to a single carrier on a single route in 1969, the FCC in 1971 issued its *Specialized Carrier* decision, announcing a new policy generally favorable to the licensing of further specialized carriers.[10] The proceeding was conducted as a rulemaking proceeding primarily to establish general policy guidelines. 29 F.C.C.2d at 871-72. The specialized carrier applicants, headed by a group known as MCI carriers ("MCI"), promised to provide new services differing from those provided by existing carriers (*e.g., id.* at 874), and the FCC gave heavy emphasis to this point.[11] MCI emphasized that it sought to offer "point-to-point" private line service connecting its customers' premises, expressly stating that "no switching between customers is involved."[12]

The specialized carriers generally planned to build their microwave transmission facilities only along high-density, low-cost routes betwen major cities, leaving other, less profitable routes and intracity local distribution to the Bell System. The MCI carriers intended

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substantial cost savings for the user, since it would pay only a fixed monthly charge.

[10] *Specialized Common Carrier Services*, 29 F.C.C.2d 870, *reconsideration denied*, 31 F.C.C.2d 1106 (1971), *aff'd sub nom. Washington Utils. & Transp. Comm'n* v. *FCC*, Nos. 71-2919 and 72-1198, 9th Cir., Jan. 20, 1975.

[11] The FCC concluded that "the applicants are seeking primarily to develop new services and markets, as well as to tap latent, but undeveloped submarkets for existing services . . . ." 29 F.C.C.2d at 906. See also 29 F.C.C.2d at 904-05, 909, 912-13, 919-20.

[12] *E.g.*, Comments of MCI carriers, Oct. 1, 1970, pp. 26-27, 102-03, 167-68, filed in the *Specialized Carrier* case.

that the Bell System should provide "local loops" to create the necessary end links between MCI's intercity transmission sites in each city and MCI's customers within the city.[13] In the *Specialized Carrier* proceeding, the FCC—without ordering the Bell System to provide such local loops—indicated its expectation that the Bell System would provide them when the specialized carriers were established. 29 F.C.C.2d at 938-41.

MCI's Demands for Physical Connection With the Switched Network. Following the *Specialized Carrier* decision, the Bell System provided the specialized carriers with local loops, as the new carriers began to institute their point-to-point private line service. Then, for the first time, MCI demanded that the Bell System also physically connect MCI's transmission facilities into the switched network. In particular, MCI asserted that the Bell System had to provide such physical connection to allow MCI to provide foreign exchange ("FX") and common control switching arrangement ("CCSA") service. These services, which neither MCI nor the FCC had ever mentioned in the *Specialized Carrier* proceeding, have a direct impact on the switched network:

> *FX*: FX service gives the customer a circuit connecting his office with a telephone company local switching exchange in a different ("foreign")

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[13] A local loop in such a case would provide an open circuit between an MCI customer's office and MCI's microwave-radio transmission site in, or on the outskirts of, the same city. 18 F.C.C. at 953-54 (quoted p. 6, n. 8, above). The local loop, like the interstate private line with which it connects, dedicates the circuit exclusively to the use of the individual user. Thus, like the private line, it also bypasses the switching machines which control the switched telephone network.

city. Consequently, the intercity circuit is connected directly into the switched telephone network and the customer may make calls through the "foreign" exchange anywhere in the switched network. For instance, a customer in Washington with FX service to New York would have a telephone in his Washington office connected with a New York exchange so that he could place (and receive) ordinary telephone calls as if he were in New York.[14]

CCSA: In CCSA service, a customer who has several private lines between different points may interconnect them with one another through switching equipment located in a telephone company exchange. That switching equipment is also used by the telephone company for other switching, including the handling of ordinary calls over the switched network and the provision of service to other CCSA customers. CCSA service gives the subscriber a small switched network of his own but any malfunction of his own circuit can directly affect the users of the switched telephone network.[15]

The physical connection proposed by MCI was thus quite unlike the Bell System's furnishing of local loops to specialized carriers for their asserted "new" point-to-point private line services. Since in that instance neither the loop nor the MCI intercity circuit connects

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[14] The Washington customer would ordinarily have a New York telephone number listed in the New York directory and anyone in New York (or elsewhere) calling that number would be switched through the local exchange, into the intercity circuit, and thence to the Washington office.

[15] For example, a customer with two private lines—one between New York and Washington and one between New York and Boston—can utilize the telephone company switching machinery to interconnect his two private lines at New York, allowing direct communication between Washington and Boston.

with the switching machinery, a failure or malfunction of the intercity circuit cannot endanger the switched network; by contrast, connecting such a circuit into Bell System switching machinery used for operating the switched network presents an opportunity for a host of dangers including adverse operational and cost effects. See pp. 12-13, below. Moreover, FX and CCSA were patently not new services and the physical connection sought by MCI would only duplicate existing services, fragment the market, and impair the Bell System's ability to maintain low rates for the users of the switched network as a whole. *Id.*

The Bell System asserted that physically connecting MCI into the switched network would be contrary to the public interest and presented basic issues that the FCC had never addressed or resolved. Indeed, in defending the *Specialized Carrier* decision in the Ninth Circuit where it was assailed by state utility commissioners, the FCC's brief had belittled the alleged adverse impact of the decision by explaining that it did *not* contemplate connection of specialized carriers into the switched network:

> "It was made clear that their facilities [those of specialized carriers such as MCI] would *not* be connected with the interstate telephone network of AT&T, although many applicants would require connection with local telephone companies in order to obtain local distribution (*i.e.* from the microwave terminal to a customer's premises)." [16]

[16] Brief of the FCC and the United States, p. 9 (emphasis added). The brief (pp. 8-9) referred to the specialized carriers' applications to construct "point-to-point microwave facilities" and stressed that subscribers would obtain "an open line between a limited number of points, and would be able to communicate only with certain specified locations." *Id.* Far from being an inad-

MCI then brought suit to require the Bell System to provide FX and CCSA connections but when the District Court entered such an injunction, the Third Circuit reversed. *MCI Communications Corp.* v. *AT&T*, 496 F.2d 214 (1974). It stated that it was "unclear" whether any prior FCC pronouncements envisaged connecting MCI into the switched network for FX or CCSA service and that this "uncertainty" concerning the existence and scope of any such obligation rendered the injunction improper. 496 F.2d at 221-22.[17]

Proceedings Below. In December 1973, shortly before the District Court injunction in the *MCI* case, the FCC initiated Docket No. 19896 by issuing an "order to show cause" to the Bell System. 44 F.C.C.2d 245. The order required parties to brief several questions including "whether" the FCC had previously ordered the Bell System to provide FX-CCSA physical connection to MCI under Section 201(a) of the Communications Act, 47 U.S.C. § 201(a), and if not, "whether" it should be ordered to do so. *Id.* at 251-52. Section 201(a) pertinently provides that the FCC may issue "orders" in "cases" requiring physical connection between carriers where after "opportunity for hearing, [it] finds such action necessary or desirable in the public interest . . . ."[18]

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vertent reference, the FCC made the same point again in slightly different terms later in its brief. *Id.*, p. 43. Both passages are set forth in Appendix F of this petition.

[17] The FCC pronouncements relied upon by MCI included the *Specialized Carrier* decision where, as the court noted, the FCC did not specifically refer either to FX or CCSA service, and a letter dated October 4, 1973, from the FCC to AT&T (see p. 15, below), which also made no reference to FX or CCSA service and was primarily addressed to the issue of where Bell System tariffs for facilities offered to other carriers should be filed. 496 F.2d at 221.

[18] Under common law, a carrier is not obligated to connect with

The Bell System promptly petitioned the FCC to provide an evidentiary hearing, in accordance with prior practice under Section 201(a) (see p. 21, below), so that the Bell System could demonstrate material facts showing that the requested physical connection into the switched telephone network would disserve the public interest. It sought the opportunity to prove that such physical connection could cause operational and technical harms impairing the efficient functioning of the network and that failure of specialized carrier intercity circuits could cause serious malfunctions of switching machinery serving the switched network.[19]

In addition, the Bell System sought an opportunity to provide evidence that the proposed physical connection would produce significant diversions of traffic not only from the Bell System's FX and CCSA services but also from the basic MTS and WATS services, which are the principal switched services used by the public (A. 232-33).[20] This diversion, the Bell System

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other carriers but may choose to carry traffic solely on its own facilities. *Atchison, T. & S.F. RR.* v. *Denver & N.O. R.R.*, 110 U.S. 667, 680 (1884); *Oklahoma-Arkansas Telephone Co.* v. *Southwestern Bell Telephone Co.*, 45 F.2d 995 (8th Cir. 1930), *cert. denied*, 283 U.S. 822 (1931).

[19] Bell System petition, paras. 2-10 (A. 144-52); Bell System brief, paras. 32-41 (A. 224-33). The Bell System did not merely describe ultimate conclusions: it specifically advised the Commission in over six pages of detailed description (A. 227-33), buttressed with a five-page technical annex (A. 261-65), of the facts it intended to prove in an evidentiary hearing.

[20] The diversion of MTS and WATS traffic results because large users who now employ MTS or WATS can often substitute services like FX or CCSA, depending upon the comparative costs. Because of their relation to the switched network, FX and CCSA services

proposed to show, would result in lost revenues and idling of existing facilities (A. 233). Since this economic harm would necessarily be reflected in higher rates for the public users of the switched network, this issue also presented a serious public interest question requiring a full examination before such physical connection was required.

The FCC denied the request for an evidentiary hearing as "premature" and affirmed its intention to proceed without taking evidence. 45 F.C.C.2d 261, 262. At oral argument, the Bell System renewed its request for an opportunity to submit evidence on the adverse operational and economic effects threatened by physical connection. Tr. 16-40 (A. 880-904). Instead, the FCC on April 23, 1974, issued the decision here under review and entered a cease and desist order requiring the Bell System to physically connect specialized carriers into the switched network. 46 F.C.C.2d 413 (Pet. App. 1b).[21]

On review, the Third Circuit upheld the FCC's decision. 503 F.2d 1250 (Pet. App. 1a).[22] First, it sustained the requirement of physical connection without an evidentiary hearing. It stated that the FCC was entitled to proceed by rulemaking, ignoring the FCC's use here

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have an obvious functional capacity to divert MTS and WATS traffic.

[21] The Commission not only ordered FX and CCSA physical connection, but also ordered the Bell System to provide connections to the specialized carriers for all other unnamed future interstate services that specialized carriers might be authorized to provide either "presently or hereafter." 46 F.C.C.2d at 438 (Pet. App. 45b).

[22] The jurisdiction of the lower court was based upon Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), and 28 U.S.C. §§ 2341-50.

of a "show cause" proceeding resulting in a cease and desist order. Although the court below conceded that other courts of appeals required the receipt of evidence on complex issues of great substantive importance whatever label was attached to the proceedings (see p. 24, below), the court "declined to follow this line of cases." 503 F.2d at 1264-66 (Pet. App. 28a-31a).

Second, the lower court upheld the FCC's reliance on its *Specialized Carrier* decision to support its present order, and the court itself repeatedly relied upon the earlier decision. 503 F.2d at 1259-62 (Pet. App. 18a-23a). The Bell System had argued at length that such reliance by the FCC was clear error under *Morgan* v. *United States*, 304 U.S. 1 (1938), since the Bell System had plainly not been "fairly advised" in the *Specialized Carrier* proceeding that physical connection with the switched network was in issue. The lower court never directly addressed this central claim of error.

B. The Western Union Dispute

The decision below presents a further issue involving the FCC's power under decisions of this Court to reject tariffs summarily. For many years, the Bell System has provided certain facilities to Western Union Telegraph Co. ("Western Union") pursuant to contractual arrangements. These have included local distribution facilities, as well as intercity facilities. The contracts have no fixed terms but can be canceled entirely on five years' notice. 46 F.C.C.2d at 430-31 (Pet. App. 32b).

As the specialized carriers emerged, the FCC forcefully pressed the Bell System to provide facilities to carriers on the basis of tariffs filed under and governed by Sections 201-05 of the Communications Act, 47

U.S.C. §§ 201-05. Under these sections, where services are provided pursuant to tariff, users in the same class are normally afforded the same tariff rates and the FCC may review such tariff rates to assure that they are just and reasonable. If the Bell System tariffed its offering to other carriers, a carrier obtaining facilities from the Bell System would—like any other customer—obtain a panoply of statutory protections under Sections 201-05.

The FCC moved to implement this tariffing approach on September 12, 1973, when it authorized AT&T to construct a domestic satellite system and also authorized a number of domestic satellite carriers to construct their own satellite systems to provide private line services.[23] AT&T's grant was conditioned on its providing to other domestic satellite carriers local distribution and related facilities on a tariff basis so that the new carriers could offer end-to-end private line service themselves.[24]

On October 4, 1973, the FCC sent a letter to AT&T, taking note of the Bell System's plans to file tariffs with the state commissions offering local distribution facilities on a tariff basis to specialized carriers, including Western Union (A. 28). The FCC strongly request-

[23] The domestic satellite carriers are a new class of carriers which, like specialized carriers, were intended to provide private line service. While the specialized carriers primarily utilize terrestrial microwave radio transmission systems, the satellite carriers were expected primarily to use satellite transmission systems.

[24] The Commission's decision in *AT&T*, 42 F.C.C.2d 654, 660 (1973), provided that "all charges . . . applicable to the provision by the Bell System companies of interconnection facilities [required for domestic satellite carriers] *shall be set forth in tariff schedules* filed pursuant to Section 203 of the Act . . ." (emphasis added).

ed that the Bell System "file tariff schedules with this Commission" to provide facilities to specialized carriers under terms and conditions which are "just, reasonable and non-discriminatory" (A. 30). The Bell System then filed tariffs with the FCC, and it notified Western Union that henceforth it would provide facilities to Western Union pursuant to the tariffs rather than on a contractual basis.

Under the Interstate Commerce Act, which was the legislative model for the Communications Act, it is settled that a tariff filing supersedes a prior contract.[25] Such a tariff filing provides the user with the right to a just and reasonable rate and the other statutory protections. Nevertheless, Western Union filed petitions with the FCC urging it to suspend or reject the Bell System tariffs so far as they applied to Western Union. The FCC ordered briefing on Western Union's rejection claims simultaneously with briefing of the physical connection controversy. 44 F.C.C.2d 245.

MCI joined in Western Union's demands that the tariffs be rejected. It claimed that the Bell System was bound to offer facilities to Western Union at the former, lower contract rates and that—in order to avoid any discrimination among carriers with respect to tariffed offerings—the same lower rates would have to be extended to MCI, even if the tariff rates were just and reasonable under the Communications Act. The Bell System—which had agreed to rates in the Western Union contracts based upon pre-inflationary 1968 and 1969 cost data—was unwilling to extend these now in-

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[25] See *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908); *Cincinnati, N.O. & T.P. Ry.* v. *Chesapeake & O. Ry.*, 441 F.2d 483 (4th Cir. 1971).

adequate rates to a range of new specialized carriers, unjustly enriching those carriers and burdening the Bell System's own customers.[25]

In its decision here under review, the FCC summarily rejected the Bell System tariffs, so far as they superseded the Western Union contracts, without making any determination that the tariff rates were unjust or unreasonable. The FCC held instead that "controlling judicial precedent" automatically required rejection, and it relied primarily on this Court's decision in *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956), a decision which construed provisions of the Natural Gas Act and distinguished its statutory plan from the Interstate Commerce Act plan construed in *Armour*. 46 F.C.C.2d at 433-34 (Pet. App. 37b-38b).

On review, the lower court sustained the summary rejection of the Bell System tariffs. It conceded that under *Armour* a tariff filing under the Interstate Commerce Act does supersede a prior contract between railroad and shipper, and that this principle had recently been applied by the Fourth Circuit to prior contracts between two railroad carriers. *Cincinnati, N.O. & T.P. Ry.* v. *Chesapeake & O. Ry., supra.* Nevertheless, the court below concluded that this Court's analysis of the Natural Gas Act in *United Gas Co.* v. *Mobile Gas Corp.* was applicable to the Communications Act and warranted the Commission's summary rejection. 503 F.2d at 1275-1282 (Pet. App. 48a-63a).

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[25] See, *e.g.*, MCI opposition to petition of the Bell System Companies, pp. 11-14 (A. 194-97); MCI reply brief, pp. 27-59 (A. 743-45).

REASONS FOR GRANTING THE WRIT

This case properly warrants plenary review in this Court. Both the issue of physical connection into the switched network and the tariff rejection issue respecting Western Union involve conflicts between the decision below and decisions of this Court. *Morgan* v. *United States,* 304 U.S. 1 (1938); *Armour Packing Co.* v. *United States,* 209 U.S. 56 (1908). In addition, in sustaining physical connection orders imposed without an evidentiary hearing, the lower court expressly declined to follow recent precedents in other circuits, while the tariff rejection issue involves an inescapable conflict between the lower court and the Fourth Circuit's decision in *Cincinnati, N.O. & T.P. Ry.* v. *Chesapeake & O. Ry.,* 441 F.2d 483 (1971).

The case not only presents recurring legal issues on which this Court's guidance is appropriate, but also involves a matter of public importance. The physical connection of specialized carriers into the switched network creates a potential for severe harm—operational and economic—to an essential national asset. The decisions of the FCC and the court below, which require such physical connection but deny the Bell System an opportunity to present and test evidence respecting these vital public interest issues, deserve review in this Court.

I. The Denial of An Evidentiary Hearing Presents an Important Question of Statutory Construction and a Recurring Issue of Administrative Law Which Has Divided the Lower Courts.

The refusal of the FCC and the court below to permit an evidentiary proceeding warrants review in this Court for two basic reasons: First, it involves the construction and application of a federal statute in a con-

troversy which is itself vitally important and is bound to be recurring. Second, the statutory issue is intertwined with a basic issue of administrative law and due process on which the lower courts are divided—whether an agency may issue far-reaching orders, directly affecting individual respondents in matters of great complexity and moment, without accepting and evaluating evidence from the parties on disputed issues of material fact.

1. In this proceeding, the FCC for the first time undertook to give specific attention to the question whether the Bell System should be required to physically connect specialized carriers into the switched network.[27] Under Section 201(a) of the Act, the FCC may by "orders . . . in cases" require physical connections between carriers based upon findings that such action is "necessary and desirable in the public interest." The Bell System repeatedly sought an opportunity to present evidence in this case to show that the public interest would not be served by ordering such connections with the switched network, and the FCC denied this request. See pp. 12-13, above.[28]

The Bell System's requests were supported by a detailed showing of the factual issues requiring proof

[27] However earlier Commission pronouncements may be read, one thing is patently clear: in none of them, including the *Specialized Carrier* decision, does there appear a single reference to FX or CCSA service, physical connection of the specialized carriers into the switched network, or any of the problems that such connections could create.

[28] The Bell System also sought to show how the physical connection here involved differs, both in its design and impact, from the arrangements by which AT&T and local telephone operating companies serving their own exclusive territories provide interstate service on a partnership basis. Bell System brief, paras. 42-47 (A. 234-37).

and the nature of the facts the Bell System would undertake to prove in an evidentiary proceeding. See pp. 12-13, above. Because of the nature and role of the switched network, any threat to its operational capacity presents issues that are extremely complex and far-reaching. Under any normal summary judgment practice, the court or agency would have to regard the Bell System as having raised issues requiring a trial.[29]

The Bell System's claim to an evidentiary hearing is strongly supported by the language of Section 201(a) and the past practice of the FCC in interpreting and applying that statute. The statute refers to "orders" to be entered in "cases," and it was developed against the background of law in the railroad field, where the decisions clearly established that a blanket obligation to interconnect was not permissible, and that interconnection had to be imposed on a case-by-case basis.[30]

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[29] *E.g., Poller* v. *CBS*, 368 U.S. 464 (1962); *Retail Store Employees Union* v. *FCC*, 436 F.2d 248 (D.C. Cir. 1970). The Third Circuit's decision in this case did not suggest that the Bell System's allegations were insufficiently detailed or precise, but rested its approval of the summary procedures on other grounds. See pp. 24-25, below. The Bell System's factual allegations were in fact far more detailed and specific than the issues the Commission has itself described as warranting evidentiary hearings in prior interconnection cases under Section 201(a). See, *e.g., Western Union Telegraph Co.*, 17 F.C.C. 152, 154 (1952), *reconsideration denied*, 17 F.C.C. 503 (1953).

[30] *State of Washington ex rel. Oregon R. & N. Co.* v. *Fairchild*, 224 U.S. 510 (1912); *Missouri P. Ry.* v. *Nebraska*, 217 U.S. 196 (1910). Thus, this is not a case like *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973), where Congress has specifically prescribed rulemaking as an appropriate form of proceeding, and even in that case the responsible agency accepted evidence before making its determination. See p. 24, n. 37, below.

In past cases of far less significance, the FCC has construed Section 201(a) as requiring evidentiary hearings as a prerequisite to physical connection orders.[31] In one such instance, the FCC itself noted that "the reference to 'cases' [in Section 201(a)] indicates the necessity for having definite facts . . . upon which to base the determination of public interest" and it described the "hearing" as one "wherein specific facts are established relative to which the 'public interest' yardstick can be applied." *Western Union Telegraph Co., supra,* 17 F.C.C. at 172. The ICC has similarly provided evidentiary hearings under its own counterpart statute.[32]

The present case is unquestionably one of great practical importance, a consideration that this Court has in the past deemed relevant in granting certiorari. As the Bell System sought to show, it involves potential harm to the integrity and operation of the switched network. Moreover, the physical connection ordered here will divert switched traffic from the Bell System's intercity facilities and thereby impair its ability to manage the switched network with optimum efficiency and to

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[31] See *Western Union Telegraph Co.*, 17 F.C.C. 152, *reconsideration denied,* 17 F.C.C. 503 (1953); *Carpenter Radio Co.*, 12 F.C.C. 2d 857, *reconsideration denied,* 13 F.C.C.2d 722 (1968); *Tri-City Telephone Co.*, 20 F.C.C. 2d 674 (1969); *ITT World Communications Inc.*, 39 F.C.C.2d 778, *additional issue added,* 42 F.C.C.2d 228 (1973).

[32] The ICC, in ordering the establishment of through routes between carriers under Section 15(3) of the Interstate Commerce Act, 49 U.S.C. § 15(3), has done so after hearings to develop evidence to support the necessary public interest findings and has specifically declined to do so where the evidentiary showing has not been made. See, *e.g., Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry.*, 226 I.C.C. 7, 8, 20-21 (1938); *Public Service Commission* v. *Central P. Ry.*, 159 I.C.C. 630, 662-63 (1929).

realize the full operating economies that have contributed to low telephone rates. The experience of the railroad industry, where duplicating lines and lack of central planning are endemic, is too recent and minatory to allow the interstate switched message telephone network to be similarly fragmented in a summary fashion.

Yet, in the face of these major issues involving facts directly pertinent to the Bell System, the FCC here adopted a construction of Section 201(a) that cannot properly be defended. The FCC did not streamline the presentation of evidence or confine cross-examination; rather, it adopted a course that ultimately required it to make its public interest determinations without any evidentiary foundation whatever and without any procedure for resolving factual dispuates. The Section 201(a) issue presented would thus fully warrant plenary review, even apart from the broader legal issue on which the courts of appeals are divided.[33]

2. Certiorari is also justified to resolve the broader legal issue of administrative due process, which is presented whether the proceeding below is regarded as adjudication or rulemaking. In the context of an adjudicatory proceeding, the FCC's refusal to afford an opportunity to submit and test evidence is in direct conflict with decisions of this Court. Those decisions hold that in an adjudicatory proceeding, where important interests are at stake and disputed issues of material

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[33] Although the denial of an evidentiary proceeding is itself reversible error, the very absence of facts on which to base a proper determination then led the FCC to adopt a rationale inconsistent with *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), and *Hawaiian Telephone Co.* v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974).

fact have been raised, an opportunity to have evidence submitted, tested, and evaluated before a decision is reached is mandatory.[34]

The present FCC proceeding was unquestionably adjudicatory. It began with a show-cause order directed against the Bell System (44 F.C.C.2d at 245, 252); it focused directly upon the Bell System's switched network and the specialized carriers' claims to interconnect with it (46 F.C.C.2d at 414-15 (Pet. App. 3b-4b)); and it concluded with a cease-and-desist order directed specifically against the Bell System. *Id.* at 439 (Pet. App. 46b-47b). Even if the FCC had purported to conduct the proceeding as a rulemaking—which it did not—the outcome would be nothing more than "individual action . . . masquerading as a general rule." *American Airlines, Inc.* v. *CAB*, 359 F.2d 624, 631 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

Plenary review in this Court is equally warranted even if it is assumed that the FCC possessed and properly invoked rulemaking powers under Section 201 (a).[35] Regardless of the label agencies attach to their

[34] See *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937); *Londoner* v. *Denver*, 210 U.S. 373 (1908). This Court recently cited *Londoner* in *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973), in distinguishing such "proceedings designed to adjudicate disputed facts in particular cases" from rulemaking proceedings, where full adjudicatory procedures are not required. *Id.* at 244-45.

[35] The lower court's decision contains an extensive discussion purporting to establish the Commission's right to use rulemaking to establish physical connection requirements under Section 201(a). 503 F.2d at 1264-68 (Pet. App. 28a-36a). It never explains how this asserted power could apply to the present proceeding since the Commission never even purported to follow rulemaking procedures.

proceedings, other courts of appeals have held that where disputed questions of fact arise, material to public interest issues in important matters, some form of evidentiary presentation and testing of evidence must be permitted, even if the full dignity of an adjudicatory proceeding is not attained. Both the District of Columbia Circuit and the Fourth Circuit have made this clear in cases clearly involving rulemaking.[36]

Citing the *Appalachian* decision from the Fourth Circuit and several other cases from the District of Columbia Circuit, the decision below stated with respect to the right to an evidentiary hearing that "we decline to follow this line of cases." 503 F.2d at 1266 (Pet. App. 32a). Under this Court's decisions, the issue appears to be an open one.[37] Thus, even assuming the present case to involve an exercise of rulemaking powers, it involves an issue on which the courts of appeals are divided and presents "an important question of federal law which has not been, but should be, settled by this [C]ourt." Sup. Ct. R. 19(1)(b).

The reasons given by the lower court for denying an evidentiary hearing underscore the need for review

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[36] See, *e.g.*, *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238 (D.C. Cir. 1973); *Appalachian Power Co.* v. *Environmental Protection Agency*, 477 F.2d 495 (4th Cir. 1973); *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615 (D.C.Cir. 1973).

[37] In *United States* v. *Florida East Coast Ry.*, *supra*, the Court distinguished between rulemaking and adjudication but did not declare that an agency may decide major, factually related issues while resisting *any* evidentiary presentation whatever. On the contrary, the opinion in *Florida East Coast Ry.* plainly shows that the ICC gathered substantial evidence from the parties before reaching its decision. 410 U.S. at 231. Similarly, the Administrative Procedure Act contemplates that even in the most informal rulemaking proceeding, an opportunity for submission of data by the parties—not merely briefs—is required. 5 U.S.C. § 553(c).

in this Court rather than justify the decision. The lower court stated that an evidentiary proceeding could be difficult to manage because of the prospect of cross-examination by the large number of persons interested in policy-related matters. 503 F.2d at 1266 (Pet. App. 32a). Yet, as cases like *Appalachian* and *Mobil* make clear in requiring *some type* of evidentiary proceeding, the agencies have ample means to tailor the proceedings and yet at the same time to establish an evidentiary basis for important agency action.[38]

The lower court also said that it believed the Bell System could protect itself against the threatened harms by tariff requirements relating to physical connection. 503 F.2d at 1268 (Pet. App. 35a). However, the court thus begged the very question on which the Bell System sought to introduce evidence: namely, that such tariff restrictions may not adequately protect the switched network against harm or safeguard the public against operational interference and greatly increased costs. The lower court's own summary acceptance of a contrary view—without any evidence whatever—emphasizes why the procedural safeguards of an evidentiary proceeding are so important.

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[38] The FCC has itself recently adopted such procedural shortcuts in several proceedings, and these measures—whatever their merits or demerits—confirm that evidentiary proceedings can readily be expedited. For example, in evaluating AT&T private line rates challenged by the specialized carriers, the FCC has provided for written direct testimony, cross-examination confined to written interrogatories, expedited scheduling and the omission of an initial report by an administrative law judge. *AT&T*, 45 F.C.C.2d 88 (1974).

II. The Decisions of the FCC and the Lower Court Conflict with *Morgan* v. *United States*, 304 U.S. 1 (1938), and Similar Decisions in Other Circuits.

Although the *Specialized Carrier* decision nowhere discussed FX or CCSA service or any physical connection into the switched network, the FCC nevertheless repeatedly relied upon that decision to supply major premises for its present order to the Bell System. 46 F.C.C.2d at 420-32 (Pet. App. 13b-35b). The court below similarly dwelt upon the *Specialized Carrier* decision to support the FCC's present action. 503 F.2d at 1255-63 (Pet. App. 9a-26a). This reliance on the FCC's new construction of its earlier decision violates an elementary and settled precept of administrative due process, and it gives rise to a direct conflict with decisions of this Court and other courts of appeals.[39]

It has been settled since *Morgan* v. *United States*, 304 U.S. 1 (1938), that an administrative hearing must include "a reasonable opportunity *to know the claims* of the opposing party and to meet them," and that respondents "are entitled to be *fairly advised* of what the Government proposes and to be heard upon its proposals before it issues its final command." 304 U.S. at 18-19 (emphasis added). When a party is bound by earlier determinations on issues concealed from view at the time they were supposedly resolved, the party is denied due process, whatever may have been the original, unspoken intent of the regulator.[40]

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[39] The FCC's decision must stand, if at all, on the basis chosen for it by the agency. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943).

[40] The basic principle of *Morgan* has been followed in a number of courts of appeals' decisions including, for example, *Rodale Press, Inc.* v. *FTC*, 407 F.2d 1252 (D.C.Cir. 1968), and *NLRB* v. *H. E. Fletcher Co.*, 298 F.2d 594 (1st Cir. 1962).

However the *Specialized Carrier* decision may now be construed, clearly at the time that proceeding was conducted the Bell System had no reasonable basis for supposing that the FCC was considering whether specialized carriers should be physically connected into the switched network to provide FX-CCSA service or for any other reason. MCI itself had described its system as involving only "point-to-point" private line service connecting its customers' premises and expressly stated that "no switching between customers is involved." See p. 7, above.[41] The FCC both in its notice of rulemaking and in its decision repeatedly discussed local loops as the form of local distribution the Bell System would be expected to provide.[42] The decision below acknowledged that "[t]here is no mention of FX or CCSA in the *Specialized Common Carrier Services* decision." 503 F.2d at 1259 (Pet. App. 18a).

Subsequent interpretations of the *Specialized Carrier* decision, by the Commission and by the court below, make it even more apparent that the Bell System cannot reasonably be charged with any knowledge that physical connection into the switched network was in

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[41] Similar representations had been made by MCI in the earlier proceeding concerning its Chicago-St. Louis application. See p. 6, above. The FCC's decision here under review conceded that its earlier decision in the Chicago-St. Louis case had not dealt with physical connections to provide FX-CCSA service. 46 F.C.C.2d at 420 n.9 (Pet. App. 13b n.9).

[42] The notice contains at least eight such references in the space of four paragraphs. 24 F.C.C.2d at 347-49. The decision contains at least five similar references in the body. 29 F.C.C.2d at 874-76, 938-40. It also describes MCI's position as being that "local distribution does not present any truly serious problem and that, with flexibility of approach, local loop facilities will be available in one form or another." *Id.* at 952.

any way involved in that proceeding. Well after the rendition of the *Specialized Carrier* decision, the FCC represented to the Ninth Circuit in two different places in its brief on the merits in defense of the *Specialized Carrier* decision that the decision had not required physical connection between the specialized carriers and the switched network, stating that "it was made clear that [the specialized carriers'] facilities would not be connected with the interstate telephone network of AT&T . . . ." See p. 10, above. While the lower court brushes aside this statement as inadvertent, only a few months before issuing its cease and desist order the FCC again made representations to a court of appeals —this time the Second Circuit—which recognized that its *Specialized Carrier* decision created no clear mandate for such physical connection. It stated: "The Commission could rule [in Docket No. 19896] that it was never its intention to allow MCI to provide 'FX' or 'CCSA' service . . . ."[43]

The court below itself found in its original decision, reversing the injunction granted to MCI, that the *Specialized Carrier* decision provided no clear basis for resolving the FX-CCSA connection issue. The court stated that the existence and scope of any such obligation was "so unclear" (496 F.2d at 221) and involved "sufficient uncertainty" that no injunction could be granted while Docket No. 19896 was pending. 496 F.2d

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[43] FCC opposition, p. 7, filed in *AT&T* v. *FCC*, No. 73-2730, in the United States Court of Appeals for the Second Circuit. This proceeding was initiated as a precautionary review proceeding directed against the FCC's October 4 letter if, as MCI was then claiming, that letter was regarded as an interconnection order. The Commission's representation was discussed in the Third Circuit's original decision vacating the injunction obtained by MCI. See 496 F.2d at 223.

at 222. It further found that the FCC's own initiation of the docket showed that "at the very least . . . the existence and scope of interconnection orders" covering FX and CCSA interconnection "are open to legitimate dispute." 496 F.2d at 224 (footnote omitted).[44] These conclusions were based on a detailed examination of the *Specialized Carrier* decision and, in fact, establish the basic ambiguity of the *Specialized Carrier* decision in even more detail than a certiorari petition permits. See 496 F.2d at 216-19.

Thus, even after the *Specialized Carrier* decision, the Commission represented to one court of appeals (the Ninth Circuit) that it did not mandate physical connection of the specialized carriers into the switched network; it then essentially conceded to another court of appeals (the Second Circuit) that its earlier decision was ambiguous at the very least; and finally a third court of appeals (the Third Circuit) itself expressly found that the decision was "unclear" and "uncertain" on the very point here at issue. These doubts and uncertainties clearly existed well *after* the *Specialized Carrier* decision.[45] It is thus fanciful to

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[44] The court quoted the FCC's own show-cause order of December 13, 1973, ordering briefing on a number of questions including "whether" the FCC had previously ordered any physical connection pursuant to Section 201(a), and if so, "whether" it included FX-CCSA service. *Id.* at 224 n. 14.

[45] In fact, in the Ninth Circuit's recent affirmance of the *Specialized Carrier* decision (see p. 7, n. 10, above), there is no suggestion that the court read the FCC's notice or decision in that case as having considered or determined the question of physical connection of specialized carriers into the switched network to provide FX or CCSA service. On the contrary, the Ninth Circuit's opinion began its discussion of the merits by describing the specialized carriers' "proposed service" as offering communication of both

suggest that at the time that decision was under consideration the Bell System was given adequate notice that the FCC was proposing to decide the question whether specialized carriers should be physically connected into the switched network.

Under these circumstances, the Bell System obviously was denied the "reasonable opportunity to know" opposing claims and was not "fairly advised" of what the agency proposed within the meaning of *Morgan*. Absent such an opportunity and warning, reliance on the *Specialized Carrier* decision to resolve FX-CCSA physical connection issues is indefensible. The decision below is in square conflict with the principle of *Morgan* and with other circuits that have faithfully applied that principle in agency proceedings.

The FCC's *ex post facto* reinterpretation of its earlier decision cannot cure its error. In its latest decision, the FCC, through a tortuous series of inferences and financial computations, sought to show that the *Specialized Carrier* decision could be read to embrace the provision of FX and CCSA service by the specialized carriers. However, it is plainly irrelevant what the FCC *now* says it intended its earlier decision to mean: what matters under *Morgan* is what the issues reasonably appeared to be when the decision was being rendered. See *Rodale Press, Inc.* v. *FTC*, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968).[46]

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voice and non-voice signals "but only to or from limited points . . . ." Op. at 18.

[46] It is pertinent to note the comment made by FCC Commissioner—now Chairman—Wiley in the oral orgument in the FCC show-cause proceeding regarding the earlier decision: "Here is 50 percent of the business [*i.e.*, FX and CCSA service], not even mentioned to the Commission. I can remember the charts put up,

The lower court similarly asserted that its own earlier decision in the *MCI* injunction case had not represented a definitive construction of the *Specialized Carrier* decision but merely recognized that the decision was unclear on the issue of FX-CCSA connection. 503 F.2d at 1263 (Pet. App. 26a). However, this is itself a confession of error on the basic issue presented under *Morgan*: If the FCC's original decision was to that point "so unclear" and subject to "sufficient uncertainty" and "open to legitimate dispute" (496 F.2d at 221-22, 224), then certainly the Bell System was not "fairly advised" at the time of the *Specialized Carrier* proceeding.[47]

The fundamental issue at stake is an issue of fairness basic to the administrative process, whatever the form of hearing to which a party may be entitled. If a party is entrapped by determinations on matters that it never knew were presented, then the agency process cannot be deemed fair, and litigants will be disserved by their own efforts to achieve responsible compliance.[48] In

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never a discussion of the possibility of accessing all the phones from Chicago to St. Louis." Tr. 78 (A. 942) (emphasis added).

[47] The lower court's decision nowhere comes to grips with the *Morgan* argument actually made by the Bell System. Instead, it treats the Bell System as arguing that the court's earlier decision conclusively determined that the *Specialized Carrier* decision did not include FX-CCSA physical connection (503 F.2d at 1263 (Pet. App. 26a)), an argument that the Bell System never made.

[48] Although in disagreement with the FCC's *Specialized Carrier* decision, the Bell System has from the outset made a good faith effort to accept and implement that decision *as it was written*. The Bell System voluntarily provided local loops to specialized carriers without any FCC orders to do so (see p. 8, above); and it did not seek to obtain reversal of the decision in the Ninth Circuit. Most recently, it has achieved initial agreement (subject to the

light of the basic principle established by *Morgan* and followed in other courts of appeals, the action of the FCC and the court below in this case deserves plenary consideration in this Court.

III. The Summary Rejection of the Bell System's Tariffs Conflicts with Armour Packing Co. v. United States, 209 U.S. 56 (1908), and a Comparable, Recent Decision of the Fourth Circuit.

In *Armour Packing Co.* v. *United States,* 209 U.S. 56 (1908), this Court established the prevailing rule that under the Interstate Commerce Act a duly filed tariff supersedes an inconsistent prior contract. Construing the statutory plan of the Natural Gas Act and distinguishing the Interstate Commerce Act's plan, this Court has also held that a tariff filing under the Natural Gas Act does not supersede a pre-existing contract, but should be rejected where it is inconsistent with the contract. *United Gas Co.* v. *Mobile Gas Corp.,* 350 U.S. 332 (1956). The question of which of these two lines of authority applies to a tariff filing under the Communications Act is presented by this case.

In *Armour,* this Court held that under the Interstate Commerce Act an otherwise valid contract between a railroad carrier and a shipper, fixing charges for a movement of freight, was superseded by a carrier-filed tariff fixing a higher charge for all shippers for the particular type of movement. It held that where Congress has established tariff filings as the overriding statutory method for rate changes, any contract fixing a rate for the same service is made "subject to the possible change of the published rate in the manner fixed by stat-

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FCC's acceptance) with specialized carriers on interim measures, which include substantial rate reductions for interconnection facilities furnished to them by the Bell System.

ute . . . ." 209 U.S. at 82.[49] The *Armour* doctrine was reaffirmed, in its application to the Interstate Commerce Act, in *Mobile,* where the Court contrasted particular provisions of the Natural Gas Act:

> "In this respect, the [Natural gas] Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts. See *Armour Packing Co.* v. *United States,* 209 U.S. 56." 350 U.S. at 338.

In reaching a different result under the Natural Gas Act, the Court relied upon the presence of provisions in the Natural Gas Act which essentially *equate* contracts and tariffs for establishing natural gas prices, and apply the same basic statutory plan to both. Under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d, both contracts and tariff schedules must be filed with the FPC, no changes can be made in either without thirty days' notice, and contracts as well as tariffs are subject to the FPC's express ratemaking power to investigate and require revision of prices which are unreasonable, discriminatory or preferential.

In the Communications Act, as in the Interstate Commerce Act, the basic statutory provisions for filing rates, for giving notice of rate changes, and for sub-

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[49] The user is not left without protection in such a case. On the contrary, wherever a rate is contained in a tariff—under the Communications Act as well as the Interstate Commerce Act—a user has statutory remedies to assure that the rate does not exceed a just and reasonable level. Once a general common carrier offering has been made pursuant to a filed tariff, a user is entitled by statute to a just and reasonable rate for tariffed service, even though that rate may be fixed by the agency after investigation at a level lower, rather than higher, than the pre-existing contract rate.

stantive agency scrutiny of rates apply only to tariffs and make no mention whatever of contracts.[50] This similarity between the two statutory plans is not surprising since the Communications Act was modeled directly upon the Interstate Commerce Act, many provisions being "copied verbatim" and others being merely "simplified" or "clarified." S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934). The courts have repeatedly construed the two statutes *in pari materia*,[51] and relied upon precedents under the Interstate Commerce Act in evaluating the FCC's authority to implement the tariff and rate-changing provisions of the Communications Act.[52]

Prior to its present decision, the FCC itself not only followed judicial precedents construing the Interstate Commerce Act, but acknowledged that *Armour* applied to the Communications Act and recognized that it had no power to reject tariff filings because of their inconsistency with prior contracts. As recently as 1972, the Comission stated:

> "[I]t is well established that a carrier may unilaterally terminate a contract rate by publishing a tariff for a higher rate than that provided for in the contract. *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908)."

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[50] Sections 201-05 of the Communications Act; Sections 6, 13, 15 of the Interstate Commerce Act, 49 U.S.C. §§ 6, 13, 15. Prior to creation of the FCC, the ICC itself regulated interstate common-carrier communications. 36 Stat. 539.

[51] See *Stanley* v. *Western Union Telegraph Co.*, 23 F.Supp. 674, 675 (S.D. Fla. 1938); *Curran* v. *MacKay Radio and Telephone Co.*, 123 F.Supp. 83, 89 (S.D.N.Y. 1954).

[52] *AT&T* v. *FCC*, 449 F.2d 439 (2d Cir. 1972); *AT&T* v. *FCC*, 487 F.2d 865 (2d Cir. 1973).

Cruces Cable Co., 35 F.C.C.2d 707, 708 (1972), *reconsideration denied*, 39 F.C.C.2d 552, 554 (1973).[53]

The lower court's rationale for rejecting the *Armour* doctrine is far from clear, but it appears to rest on a supposed distinction between the Bell System's supply of tariffed services to users generally and its supply of tariffed services to users who happen to be carriers themselves. See 503 F.2d 1276-78 (Pet. App. 51a-56a). The lower court construes *Armour* as "predicated upon the fact that the Interstate Commerce Act does not envision that shippers' rates will be set by contract" and "that the AT&T-Western Union contracts (unlike the carrier-shipper contract in *Armour*) represent a legitimate method of ordering business relations . . . ." 503 F.2d at 1276 (Pet. App. 51a-52a). *Armour*, however, never suggested that the carrier-shipper contract there involved was illegitimate or improper in the absence of an inconsistent tariff filing but only that the basic statutory plan made any contract "subject to the possible change of the published rate in the manner fixed by statute," *i.e.*, by the filing of a tariff change. 209 U.S. at 82.

Moreover, *Armour* has only recently been followed by the Fourth Circuit in a decision which necessarily rejects any distinction under the *Armour* doctrine between ordinary users of common carrier services and users who happen to be carriers themselves. In *Cincinnati N.O. & T.P. Ry.* v. *Chesapeake & O. Ry.*, 441

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[53] In the past, the FCC recognized that the equality of contracts and tariffs under the Natural Gas Act was foreign to the plan of the Communications Act. See *Private Line Case*, 34 F.C.C. 217, 367 (1963), *aff'd sub nom. Wilson & Co.* v. *United States*, 335 F.2d 788 (7th Cir. 1964), *cert. granted in part and remanded*, 380 U.S. 950 (1965), 382 U.S. 454 (1966).

F.2d 483 (4th Cir. 1971), the Court of Appeals concluded that a tariff filing by a railroad carrier, claimed to terminate a prior contractual obligation with *another carrier,* voided the prior agreement and required enforcement of the carrier's new tariff rates. The case thus undercuts the lower court's rationale and presents a square conflict between the courts of appeals.[54]

Similarly, the FCC's action cannot be bolstered by arguing, as the FCC did, that it possesses some implied regulatory power with respect to intercarrier contracts under Section 211(a) of the Communications Act, 47 U.S.C. § 211(a). 46 F.C.C.2d at 431 (Pet. App. 33b). The counterpart provision of the Interstate Commerce Act recognizing the existence of intercarrier contracts is even broader than Section 211(a),[55] and its presence clearly did not dissuade the Court in deciding *Armour.* The basic point is that under both statutes contractual arrangements may exist, but under both—and in contrast to the Natural Gas Act—contracts are not treated

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[54] The decision below made a brief effort to distinguish the Fourth Circuit decision on the ground that the tariff there involved had become effective whereas the present Bell System tariffs so far as they apply to Western Union have not yet been put into effect since the FCC rejected them. 503 F.2d at 1281 (Pet. App. 62a). However, the Bell System tariffs were rejected solely on the ground that they conflicted with prior intercarrier contracts. If the *Cincinnati* decision correctly applied *Armour* to intercarrier contracts, then the FCC could not lawfully reject the Bell System tariffs on the ground that they were inconsistent with the prior contracts, since it is the essence of the *Armour* doctrine that the tariff overrides any inconsistent contract.

[55] Section 6(5) of the Interstate Commerce Act, 49 U.S.C. § 6(5). Both provisions are essentially informational in their purpose. Although claiming broader powers, the FCC here recognized that "Section 211(a) does not specifically invest regulatory authority over the contracts . . . ." 46 F.C.C.2d at 431 (Pet. App. 33b).

equally with tariffs but are subordinated to tariff-made rate changes.

The FCC and lower court's action in this case must be considered in light of the fact that the rejection of a tariff—without the ordinary investigation and hearing on the justness and reasonableness of the rates—is an extraordinary remedy under the Communications Act. See *Associated Press* v. *FCC*, 452 F.2d 1290 (D.C. Cir. 1971). Under ordinary circumstances, a tariffed rate change is placed into effect after a limited notice and suspension period and the carrier is entitled to collect the rate—subject to ultimate refund if the agency later finds it to be unreasonably high. If the rate cannot be placed in effect pending investigation—or if it is summarily rejected—the filing carrier suffers an irreparable loss and the carefully designed Congressional balance is disarranged.[56]

Certiorari is further justified in this case because the FCC's tariff rejection does not rest upon any deliberate exercise of agency discretion but was, in the FCC's own view, *compelled* by its reading of this Court's decision in the *Mobile* and subsequent, similar cases under the Natural Gas Act. See 46 F.C.C.2d at 432-35 (Pet. App. 34b-40b). For reasons explained above, it is *Armour*, and not *Mobile*, that provides the governing precedent in the case, and the lower court's misconstruction of this Court's decision in *Mobile* creates an additional reason for review on certiorari.

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[56] *United States* v. *SCRAP*, 412 U.S. 669 (1973) (Interstate Commerce Act); *AT&T* v. *FCC*, 487 F.2d 865 (2d Cir. 1973) (Communications Act).

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

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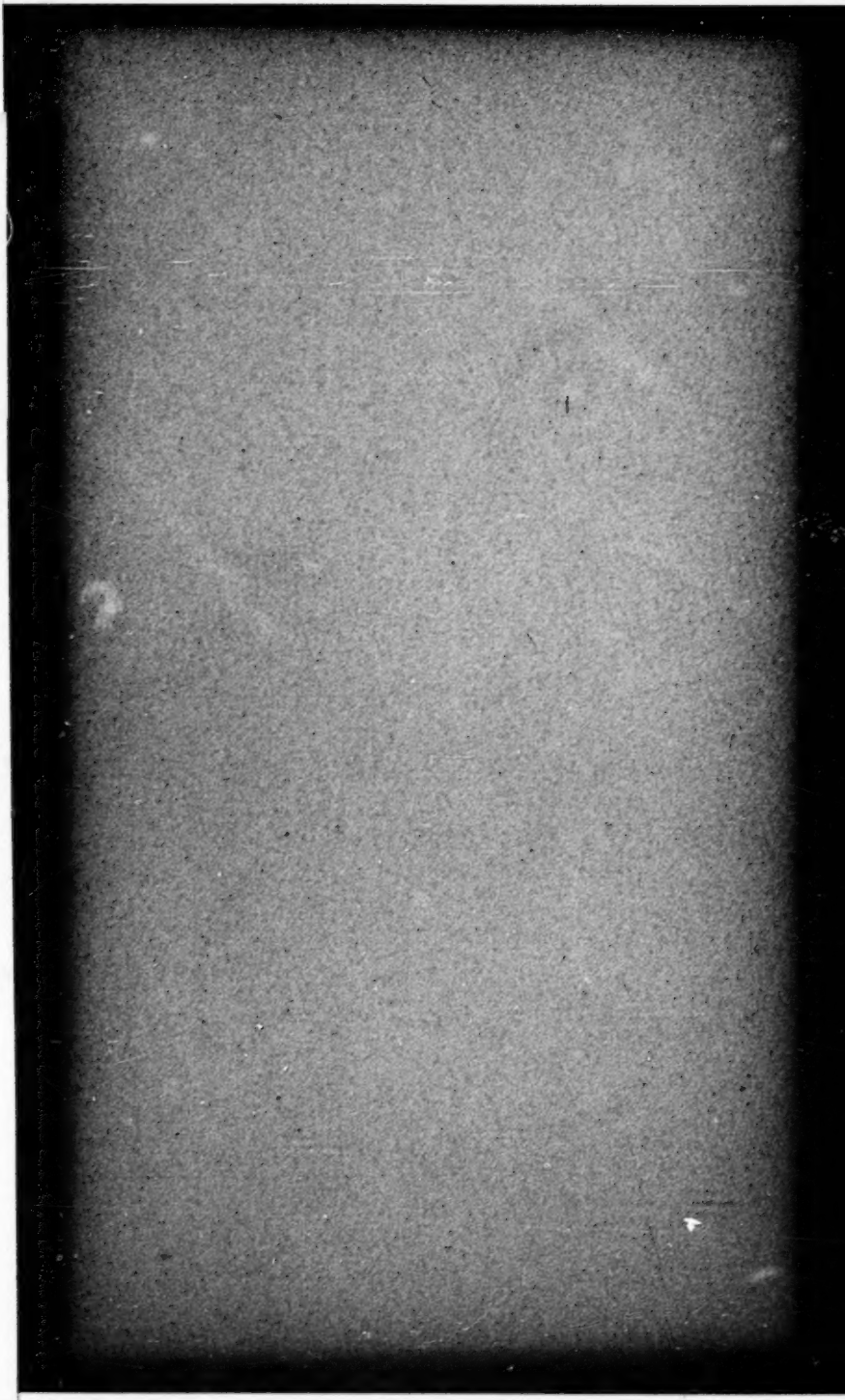

No. 74-1229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
FILED
MAR 28
MICHAEL RODAK, JR.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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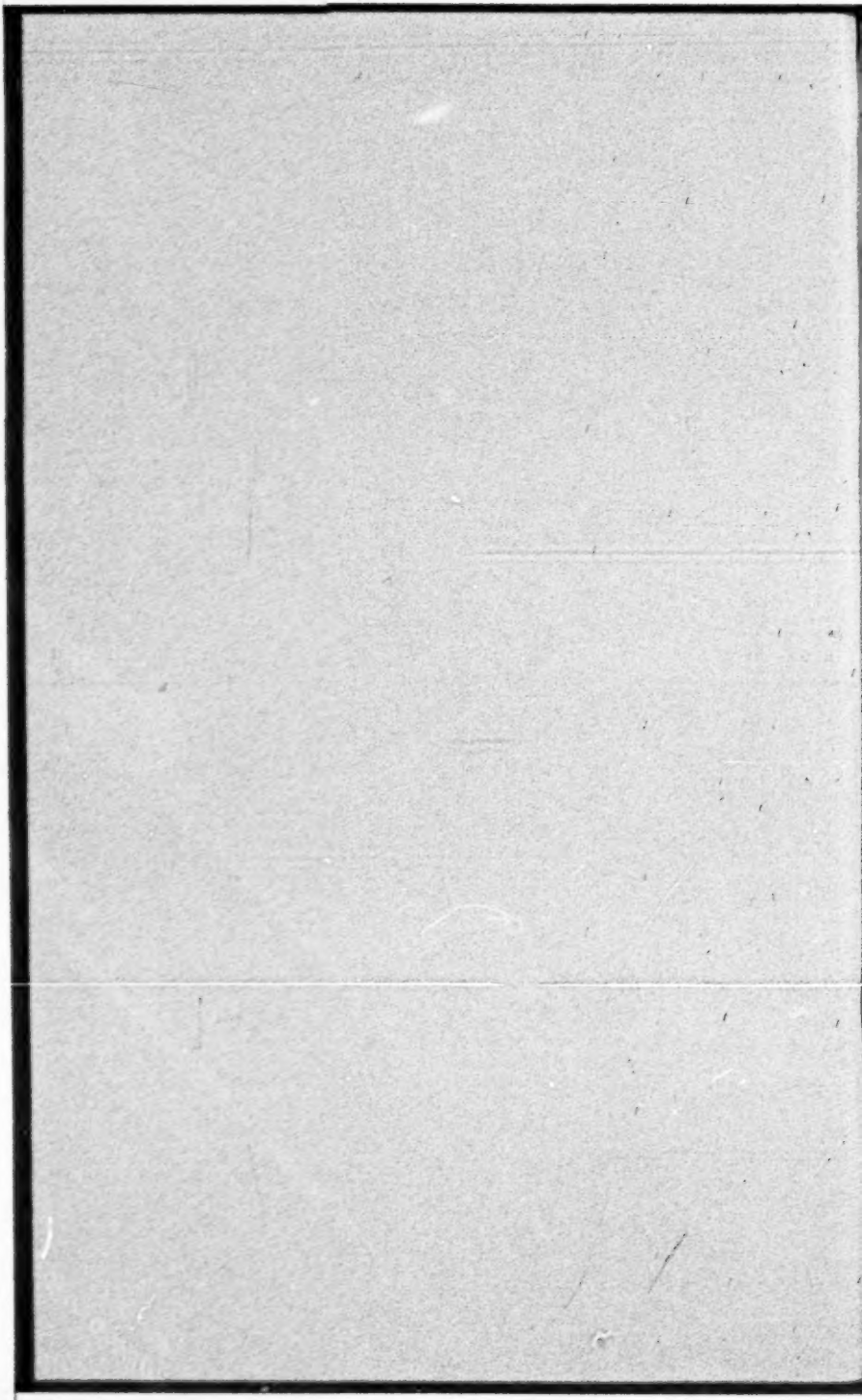

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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1386

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA and THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,
Respondents

MCI Telecommunications Corporation and MCI-New York West, Inc.
N-Triple-C, Inc.
Data Transmission Company (Datran)
American Satellite Corporation
Southern Pacific Communications Company
CPI Microwave, Inc.
Western Tele-Communications, Inc.
CML Satellite Corporation
Western Union Telegraph Company
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia
Cincinnati Bell, Inc.
Illinois Bell Telephone Company
Indiana Bell Telephone Company
Michigan Bell Telephone Company
Mountain States Telephone and Telegraph Company
New England Telephone and Telegraph Company
New Jersey Bell Telephone Company

New York Telephone Company
Northwestern Bell Telephone Company
The Ohio Bell Telephone Company
Pacific Northwest Bell Telephone Company
The Pacific Telephone and Telegraph Company
South Central Bell Telephone Company
Southern Bell Telephone and Telegraph Company
The Southern New England Telephone Company
Southwestern Bell Telephone Company
Wisconsin Telephone Company
United States Independent Telephone Association (USITA)
RCA Global Communications, Inc.

Intervenors

On Petition for Review of a Decision and Orders of the Federal Communications Commission

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Argued June 27, 1974
Before: Hastie, Weis and Garth, *Circuit Judges.*

Opinion of the Court

(Filed September 11, 1974)

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GARTH, *Circuit Judge*

Petitioners Bell Telephone Company of Pennsylvania and American Telephone and Telegraph Company call upon us to review[1] an order of the Federal Communications Commission dated April 23, 1974 (FCC Docket No. 19896).[2] The order, relevant portions of which are found in the appendix to this opinion, essentially requires the petitioners to provide certain communications services and facilities to other carriers and prohibits the petitioners from engaging in discriminatory practices. Specifically, the first two paragraphs of the order (¶ 53-54) require the American Telephone and Telegraph Company and affiliated Bell System companies (hereinafter "A T & T") to furnish to MCI Telecommunications Corp. (MCI) and to all other specialized common carriers the interconnection facilities

[1] Our jurisdiction to review the FCC order is predicated upon 47 U.S.C. § 402(a) and 28 U.S.C. § 2342.

[2] The order and supporting decision are published at 46 F.C.C.2d 413 (1974).

necessary to provide private line services.[3] The order requires that A T & T must provide the interconnection necessary for the delivery of two particular elements of private line service, Foreign Exchange service (FX) and Common Control Switching Arrangements.[4] The order further directs A T & T to cease and desist from practices which

---

[3] A "specialized" common carrier is a carrier that does not provide the full range of communications services contemplated by the Communications Act, 47 U.S.C. § 1 et seq. For the purposes of this opinion, the phrase "specialized common carrier" shall refer to carriers who specialize in "private line services."

"Private line service" provides the large-scale telephone customer with full-time private circuits for the transmission of communications between locations specified by the customer. The service operates to give the customer continuous communication without requiring the carrier to establish a new connection for each call or message.

[4] "FX" and "CCSA" are defined by the Federal Communications Commission as follows:

> Foreign exchange (FX) is a private line service that is partially 'switched'. It allows a businessman located in one state to, in effect, maintain a local phone in another state. Under FX, for example, a businessman in Washington can be reached by telephone subscribers in New York City and can himself reach New York City telephone subscribers (through a local loop in Washington, a Washington-New York interexchange line, and a business line in the New York City exchange area). However, New York City telephone subscribers could not reach Washington subscribers other than the Washington businessman over FX private line service and the latter would have to maintain a separate telephone in order to tie into the Washington exchange area.
>
> A Common Control Switching Arrangement (CCSA) is a private line system for linking the various offices of a large company through large switches on a local telephone company's premises instead of through PBX switches on the customer's premises. The private line circuits furnished in CCSA are provided for the exclusive use of the CCSA customers. However, the switching machines are shared with other private line service customers.

46 F.C.C.2d at 418, n.5 (1974). *See also* MCI Communications Corp. v. American Telephone & Telegraph Co., No. 74-1104 (3d Cir., filed April 15, 1974) slip opinion at 4, n.5.

delay interconnection for the specialized common carriers and which deny services to these carriers on a par with A T & T's own private lines service division, the Long Lines Department. The third paragraph of the order (¶ 55) rejects tariffs submitted by A T & T to the extent that such tariffs are inconsistent with prior contracts entered into between A T & T and Western Union.

Inasmuch as the two matters before the Commission involve completely distinct legal issues, we shall treat the issues separately.

I. *FX and CCSA*

A. *Background*

To evaluate the FCC's mandate regarding FX and CCSA, it is necessary to examine the agency's prior involvement with the specialized common carriers. The Commission first considered the provision of private line services by specialized common carriers in *In re Applications of Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969) (Docket No. 16509), *reconsideration denied*, 21 F.C.C.2d 190 (1970). MCI had proposed to construct facilities for the development of interoffice and interplant communication between St. Louis and Chicago. MCI agreed to be responsible only for the transmissions between microwave transmitters, leaving it to the individual customers to arrange for "loop service" i.e. interconnection between MCI's transmitter/receiving terminals and the customer's own equipment). Concluding that it would be inconsistent with the public interest to deny MCI's applications, the Commission granted construction permits for this proposed point-to-point service. Recognizing that MCI's customers might have difficulties in obtaining loop service, the FCC declared:

> Since [the existing carriers] have indicated that they will not voluntarily provide loop service, we shall retain jurisdiction of this proceeding in order to enable MCI to obtain from the Commission a prompt deter-

mination on the matter of interconnection. Thus, at such time as MCI has customers and the facts and details of the customers' requirements are known, MCI may come directly to the Commission with a request for an order of interconnection.

18 F.C.C.2d at 965 (1969).

Less than two years later, the FCC conducted a full-scale investigation into the provision of private line services. *See Specialized Common Carrier Services,* 29 F.C.C. 2d 850 (Docket No. 18920, *reconsideration denied,* 31 F.C.C.2d 1106 (1971). The Notice of Proposed Rule Making, issued in 1970, indicated that the FCC was concerned with five basic issues:

A. Whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field; and if so:

B. Whether comparative hearings on the various claims of economic mutual exclusivity among the applicants are necessary or desirable in the circumstances;

C. What standards, procedures and/or rules should be adopted with respect to such technical matters as the avoidance of interference to domestic communications satellites in the 6GHz band, the avoidance or resolution of terrestrial frequency conflicts and route blockages both vis-a-vis the facilities of established carriers and among the applicants, and the use of frequency diversity;

D. Whether some measure of protection to the applicant's subscribers is called for in the area of quality and reliability of service; and

E. What is the appropriate means for local distribution of the proposed services?

24 F.C.C.2d 318 (1970). Of these five issues, the first and last have special relevance to the instant proceedings. As to issue "A", the Commission concluded that:

> . . . there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry. We further find and conclude that a general policy factor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.

29 F.C.C.2d at 920 (1971). The Commission's conclusion with regard to issue "E" was as follows:

> We reaffirm the view expressed in the *Notice* (paragraph 67) that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier. Moreover, as there stated, "where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors." In view of the representations of A T & T and G T & E in this proceeding, upon which we rely, and the self-interest of other independent telephone companies in not losing potential new business, there appears to be no need to say more on this question at this time. Should any future problem arise,

> we will act expeditiously to take such measures as are necessary and appropriate in the public interest to implement and enforce the policies and objectives of this Decision.

29 F.C.C.2d at 940 (1971).

A T & T did not appeal the order entered in *Specialized Common Carrier Services.*[5] Presumably as a result of this 1971 decision, A T & T and MCI began negotiating for the provision of interconnection services. However, in the late summer of 1973, A T & T and its affiliates broke off negotiations with MCI and submitted tariffs to public utility commissions in each of the states in which MCI sought interconnection. Pending approval of these tariffs, A T & T announced that it would not provide interconnection to MCI if such services "terminated" in A T & T supplied equipment.

On August 27, 1973, MCI wrote to the FCC, requesting that the Commission advise A T & T that:

> (1) the [A T & T] affiliates providing services for the St. Louis-Chicago route are required to interconnect with MCI "in the provision of the interstate service which MCI is authorized by the FCC to provide";
>
> (2) A T & T must provide interconnection services to MCI on the same terms that such services are provided to Western Union and the Long Lines Department of A T & T; and
>
> (3) A T & T may not resort to state regulatory commissions as a method of delaying the provision of authorized services.

The Commission's response was prepared by Bernard Strassburg, Chief of the Common Carrier Bureau. In a

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[5] An appeal was taken, however, by other interested parties. This appeal is still pending in the Ninth Circuit as Washington UTC v. FCC (No. 71-2919) and as NARUC v. FCC (No. 72-1198).

letter to A T & T (dated August 31, 1973), Mr. Strassburg, after quoting from the *MCI* (Docket 16509) and *Specialized Common Carrier Services* (Docket 18920) decisions discussed above, stated that:

> ". . . [I]t is our view that, as requested by MCI, the associated Bell companies are required to permit interconnection or provide local channel arrangements to MCI. As the Commission also stressed in its *MCI* and *Specialized Common Carrier* decisions, the Bell companies must treat MCI no less favorably in interconnecting its facilities than they do now for the Long Lines Department of A T & T or Western Union. It should also be apparent that the Associated Bell companies are not required to obtain approval from any state or local regulatory agency of any contract or tariff before they may provide interstate services or facilities to MCI for its interstate services."

Strassburg also informed A T & T that it was obligated to provide "local distribution services" (i.e. looping service; *see* p. 3, *supra*) to MCI customers in Chicago and St. Louis.

A T & T answered Strassburg's letter on September 5, 1973. A T & T informed the Commission that it would provide local loop service to MCI, but that it could do so only after first receiving clearance from the appropriate state regulatory commissions. A T & T further declared that it had no intention of participating in a "through service" with MCI, Western Union, or any other private lines carrier. On September 28, 1973, A T & T reaffirmed its commitment to proceed first before the state commissions, noting that it had filed tariffs that would equalize rates amongst all private line carriers other than its Long Lines Department.

On October 4, 1973, the FCC Chairman responded by issuing a letter order informing A T & T that it was required to submit the tariffs to the FCC, and not to the

state regulatory commissions. With regard to interconnection, the FCC stated that the *MCI* and *Specialized Common Carrier Services* decisions directed A T & T to provide "for interconnection facilities required by [specialized] carriers to terminate the services" authorized by the Commission. Furthermore, the Chairman wrote that:

> ". . . . [I]t has been alleged that it has been the policy of the local companies of the Bell System not to furnish exchange facilities to specialized carriers or their customers for certain services which those carriers are authorized to provide and which would be in direct competition with services offered by A.T. & T. It is not at all clear from your letter that the proposed tariffs would remove this apparent discrimination as between the treatment of A.T. & T. services, on the one hand, and authorized services of the specialized carriers, on the other hand. . . . We are of the view that effective implementation of our policy objectives and the statutory scheme of the Communications Act require that you promptly file tariff schedules with this Commission in accordance with Section 203 of the Communications Act, which tariff schedules will provide the interconnection facilities essential to the rendition by the specialized carriers of all their authorized services on terms and conditions which are just, reasonable and non-discriminatory. Until such tariffs are filed and effective, there should be no delay in honoring requests of specialized carriers for interconnection facilities required by such carriers to terminate the services they are authorized by the Commission to furnish. Such facilities can be provided under contracts on an interim basis and we assume that this will be done."

(A. 29-30).

MCI requested clarification of this order. On October 19, 1973, Bernard Strassburg informed MCI that the

October 4th order contemplated A T & T's providing FX, CCSA, and other related services to the specialized carriers.[6] A T & T thereupon petitioned for review of the October 4th order before the Second Circuit.[7]

Buoyed by Mr. Strassburg's interpretation of the FCC's orders, MCI commenced an action (on November 2, 1973) in the District Court for the Eastern District of Pennsylvania to compel A T & T to provide FX, CCSA, and other related services. Jurisdiction was predicated upon 47 U.S.C. § 406.[8] While the matter was pending

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[6] We mention this October 19th letter only to provide a complete procedural background. The Commission did not rely upon this letter in reaching its conclusions below, 46 F.C.C.2d at 430, and similarly we give no weight to the letter in the substantive portions of this opinion.

[7] The Second Circuit transferred A T & T's appeal (from the October 4th order) to this Court. The transferred case, docketed as No. 74-1306, has not yet been argued.

[8] 47 U.S.C. § 406 provides that:

> The district courts of the United States shall have jurisdiction upon the relation of any person alleging any violation, by a carrier subject to this chapter, of any of the provisions of this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person, to issue a writ or writs of mandamus against said carrier commanding such carrier to furnish facilities for such communication or transmission to the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper pending the determination of the question of fact: *Provided further*, That the remedy given by writ of mandamus shall be cumulative and shall not be held to exclude or interfere with other remedies provided by this chapter.

before the district court, however, the Federal Communications Commission spoke again. On December 13, 1973, the agency released a memorandum opinion and order to show cause. *See In the Matter of Bell System Tariff Offerings*, 44 F.C.C.2d 245 (Docket No. 19896), *modified* 44 F.C.C.2d 914 (January 25, 1974). In its memorandum opinion, the FCC revealed that it had received requests for administrative action from A T & T (challenging the October 19, 1973 Strassburg letter) and from Western Union (seeking to prevent A T & T from proceeding before state regulatory bodies). Construing the requests as raising questions "concerning the lawfulness of the actions taken by A T & T and the Bell System companies with respect to the provision of interconnection facilities. . .", the Commission designated March 4, 1974 for oral argument on these questions. In paragraph 19 of the opinion and order, the FCC declared that:

> It Is Further Ordered, That the parties shall address themselves to the questions of whether (1) the Commission has heretofore ordered the telephone companies, pursuant to Section 201(a) of the Communications Act, to provide interconnection with MCI or whether such interconnection is otherwise required pursuant to rule or regulation within the meaning of Section 312 of the Act; (2) if so, (a) the scope of that order or rule or regulation with particular reference to interconnection for FX and CCSA services of MCI; (b) whether the telephone companies have complied with such order, rule or regulation and, (c) if they have not complied, the appropriate remedy, whether under section 312 of the Act or otherwise; (3) if interconnection has not hitherto been ordered or required by rule or regulation whether it should be and if so, upon what terms and conditions; and (4) whether the Commission should affirm, reverse or modify the Staff action of October 19, 1973 for which review is here requested.

44 F.C.C.2d at 251-252.

Prior to the date of oral argument before the Commission, the district court issued an extensive memorandum opinion and order in the action commenced by MCI. *See MCI Communications Corp.* v. *A.T. & T.*, 369 F. Supp. 1004 (E.D. Pa. 1973). Inasmuch as 47 U.S.C. § 406 (n.6, *supra*) is basically a mandamus statute, the district court was called upon to determine whether the FCC's prior orders had established a *clear duty* in A T & T to provide FX, CCSA and other related services. 369 F. Supp. at 1025. The court found that such a duty had been imposed and accordingly issued a preliminary injunction ordering A T & T to provide MCI with the subservices at issue. On appeal, however, this Court vacated the injunction.[9] The effect of our decision was to return to the FCC the responsibility for clarifying A T & T's duties to the specialized common carriers.

The FCC made its determination on April 23, 1974 in the decision and order now before us. (Docket No. 19896) [10] 46 F.C.C.2d 413. Reviewing the complete history as outlined above, the Commission made a dual announcement. First, it concluded that it had, in its prior actions, required A T & T to provide FX and CCSA services to MCI and other specialized common carriers on a nondiscriminatory basis (and under appropriate financial ar-

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[9] MCI Communications Corp. v. American Telephone & Telegraph Co., No. 74-1104 (3d Cir., filed April 15, 1974).

[10] Throughout the remainder of this opinion, we shall refer to the Commission's April 23rd decision as Docket 19896.

Intervening in the Commission's proceeding were MCI, American Satellite Corporation, Data Transmission Company, The Western Union Telegraph Company, N-Triple-C, Inc., Southern Pacific Communications Company, CML Satellite Corporation, Western TeleCommunications, Inc., CPI Microwave, Inc., The Chesapeake and Potomac Telephone Company, RCA, Global Communications, Inc. and the United States Independent Telephone Association.

rangements). Then, recognizing that its prior orders may not have been clear, the Commission reviewed the entire question of interconnection anew and concluded again that A T & T is required to provide such services on a non-discriminatory basis. In short, the FCC found:

> . . . that our prior orders covered interconnection for the broad range of services which the specialized carriers are authorized to provide, and that Bell has been directed to furnish interconnection facilities for the purpose of enabling MCI and the other specialized carriers to provide all such services, including FX and CCSA type services. However, we recognize that our prior orders may not have been perfectly clear. In this proceeding, therefore, we are again reviewing the question of interconnection. We have given careful consideration to the arguments advanced by Bell in its briefs and at oral argument but . . . we are of the view that achievement of our objective that competition in the provision of interstate private line communications services be on a full, fair and non-discriminatory basis requires the issuance of broad interconnection orders. Our orders herein therefore make clear that Bell is to provide interconnection facilities for all of the authorized services of the specialized carriers, including FX and CCSA.

46 F.C.C.2d at 426-427.

On the basis of this conclusion, the Commission issued orders (see Appendix) requiring A T & T to provide FX and CCSA to the specialized carriers on a non-discriminatory basis.

In petitioning for review, A T & T assails the FX/CCSA orders in three regards. A T & T contends that the interconnection orders are invalid because: (1) the FCC did not conduct an evidentiary hearing, (2) the FCC utilized substantively infirm justifications in support of

its orders, and (3) the FCC's mandate is expressed in overbroad terms. We shall evaluate these contentions in order.

B. *Nature of the Proceedings*

We are unable to evaluate A T & T's contentions without first resolving a question that cuts across many of the issues facing this Court. A T & T asserts that the April 23rd orders (see Appendix) represent the first time in which the Commission, as a whole, required A T & T to provide FX and CCSA to the specialized carriers. A T & T views the prior (1971) proceeding—Specalized Common Carrier Services (Docket 18920)[11]—as requiring no more than the furnishing of "local loops" (i.e., the interconnection of specialized carrier terminals with customer systems). *See* Petitioner's Brief at 35. Accordingly, in lodging its procedural and substantive attacks upon the April 23rd FX and CCSA orders, petitioner characterizes Docket 19896 as an independent proceeding. The Commission and several of the intervenors view Docket 19896 differently. According to the Commissin, A T & T's responsibility to supply FX and CCSA was fixed by the *Specialized Common Carrier Services decision* (Docket 18920-1971). Respondent argues that the second proceeding (Docket 19896-1974) and the resultant orders merely represent the Commission's method of enforcing a previously announced mandate.

At first glance, A T & T's characterization of the proceedings appears to have merit. There is no mention of FX or CCSA in the *Specialized Common Carrier Services* decision. Instead, the Commission speaks only generally of "private line services," without reference to the components of such service. Nevertheless, upon closer exami-

[11] We shall, at times, refer to the *Specialized Common Carrier Services* decision as Docket 18920.

nation, we are convinced that the Commission's decision in Docket 18920 includes a direction to the established carriers to provide FX and CCSA to the specialized carriers on a non-discriminatory basis. We base this conclusion upon a number of factors.

First, we reject the suggestion that Docket 18920 dealt only with "local looping."[12] In framing the issues for consideration, the Notice of Proposed Rule-Making identifies as separate matters the following issues:

> A. Whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field; and if so:
>
> . . .
>
> E. What is the appropriate means for local distribution of the proposed services,

24 F.C.C.2d at 327 (1970). In short, before reaching the issue of local distribution (issue "E"), the Commission proposed to consider a more general topic: entry of new carriers into the private line service field.

Secondly, we note that in assessing the extent to which the established carriers' revenues might be diverted by competition from the specialized carriers, the FCC focused upon the *total* revenues earned by the established carriers in private line services.[13] We find this focus to be sig-

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[12] In support of its assertion that *Specialized Common Carrier Services* dealt only with "local looping," A T & T notes that the FCC has similarly characterized the 1971 proceedings in a brief submitted to the Ninth Circuit. At oral argument herein, the Commission stated that any such representation was unintentional, and we so regard it.

[13] In Docket 18920, the FCC stated:

> 78. AT&T claims that the diversion of revenues from new entry would not be insubstantial and might prejudice telephone users by delaying the installation of large capacity facilities (e.g., 1.5 coaxial cable carrier systems) on high density

nificant. Implicit in the FCC's evaluation is the assumption that the new entrants will provide services similar

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routes—thereby jeopardizing the realization of declining unit costs which would benefit all classes of AT&T's customers. AT&T claims that competing carriers would simply be engaged in "cream-skimming" and thus cause AT&T to depart from nationwide cost-averaging and the maintenance of nationwide uniform interstate rates. Like the staff, we do not see how there could be any diversion of revenues of a magnitude to have the impact claimed by AT&T, in view of the very small percentage of AT&T's existing total market that is vulnerable to competition of the kind proposed here, the growth rate of Bell's basic services, and the likelihood that AT&T would obtain a very substantial share of the potential market for specialized services.

79. AT&T's reports to us indicate that the Bell System had gross operating revenues of approximately $16.9 billion in 1970, as compared to about $15.7 billion in 1969 (not including income from other sources such as Western Electric). Most of these revenues were derived from intrastate and interstate services which the applicants do not seek to provide. Interstate revenues constitute about 30 percent of AT&T's total revenues, and about 87 percent of the interstate revenue is derived from message toll telephone (MTT) and wide area telephone services (WATS). Interstate private line revenues (including revenue from program transmission—a service not proposed by the applicants) amount to about 4% of total Bell System revenues. While there is some data usage of the switched network, it has been estimated that such usage (measured in terminal hours) accounted for less than 1% of total usage (intrastate and interstate) in 1968 (1 SRI Report 7379B, p. 51), and about 1.7% in 1969 (paragraph 34 above).

80. Projecting present growth rates, AT&T has estimated that the existing plant of the Bell System would quadruple by 1980. As indicated in paragraph 63 above, this projection is based primarily upon the rapidly expanding growth in the use of standard voice communications services. Revenues from interstate MTT and WATS had an annual growth rate of about 12 percent from 1965 to 1969. During the same period the growth rate for interstate private line services was about 15 percent, and AT&T estimates that revenue from such services would amount to $2.7 billion by 1980. This figure would still constitute a relatively small percentage of total interstate revenues when compared to the compounded effect of a 12 percent annual growth in interstate MTT and WATS revenues. In this proceeding AT&T stated that the growth rate in the volume of data transmission over the past five years has been

to those provided by the established carriers within the rubric of "private line services." As A T & T conceded in oral argument before this Court, it has traditionally

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in the range of 50 percent annually (AT&T reply comments, page 35), and in the Computer Inquiry it estimated that data usage would amount to 5-10 percent of peak network load by 1980. Though AT&T does not indicate what proportion of this data growth and projected usage is interstate, the percentage of data usage by 1980 would be a comparatively small percentage of total usage even assuming that it were all interstate.

81. While AT&T does not challenge the revenue figures used by the staff or those used by MCI, it claims that the staff erred in assuming that private line does not represent a significant portion of the use of existing or future systems. It may be, as alleged by AT&T, that private line service accounts for about 25 percent of AT&T's total interstate channel miles. However, the point raised in the staff's analysis is that the portion of AT&T's total business which might be jeopardized, i.e., the interstate private line business, represented only a very small fraction of Bell's total revenues. In terms of the total investment of the Bell System, the investment in all interstate circuitry is of much less significance than the 25 percent of interstate channel miles noted by AT&T as being devoted to the private line services. Moreover, the total private line circuit mileage usage includes television program transmission which is a relatively voracious consumer of interstate channel mileage. For example, from 600-1200 voice circuits can be derived from the bandwidth required for a single video channel (depending on the age and type of equipment utilized). We might also note that with the rapid growth in demand for circuitry for services other than private line, the rapid growth anticipated for the specialized services and the time frame which will be required for implementation of the plans of potential competitors, we cannot visualize AT&T being burdened with unusable quantities of circuitry for any significant period of time.

82. Most significantly, we see no reason whatsoever to assume that the applicants would divert all or even a substantial portion of that comparatively small percentage of existing and projected Bell System business that is vulnerable to competition. As previously stated, the competition is for evolving, new, diverse and specialized needs in a dynamic, rapidly growing market. The applicants are seeking in large part to exploit latent demands and may well expand the size of the total communications market. Moreover, they are proposing very small scale operations compared to those of AT&T. MCI anticipates only about $55 million in total annual revenues from

provided FX and CCSA within its private line services.[14] It follows *a fortiori* that if the Commission contemplated the diversion of revenue attributable to A T & T's FX and CCSA services, the Commission must have assumed that FX and CCSA would be within the services provided by the specialized common carriers. *See* n.16, *infra*.

Third, in the same vein, we note the Commission's instruction that:

> "we do contemplate full and fair competition in the specialized field among all carriers, both established and new. . . ."

29 F.C.C.2d at 916 (1971). Given this objective of *full* competition, it is difficult to understand why the Commission would authorize the new carriers to offer an incomplete "package" of private lines services. In the absence of any suggestion to the contrary, we read the "full competition" mandate as an indication that the Commission intended to authorize the new carriers to provide all elements

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all of the MCI systems covered by applications on file at the time of its comments (Appendix C, page 3). Datran's proposed plant investment is only about $350 million, compared to AT&T's 1970 plant investment of approximately $54.8 billion and its investment programs of $7.7 and $8.2 billion for 1971 and 1972. Datran has indicated that it hopes to obtain about 10 percent of the data market by 1980. In addition, the introduction of new services and facilities by the specialized carriers would take place gradually over a period of time, with the volume paralleling the market growth in demand for specialized services. And, finally, AT&T is adapting to supply certain specialized services which have not been adequately provided in the past (e.g., its proposed digital data network), and is free to compete with the specialized carriers for the potential market. AT&T has vast competitive resources, and it is likely that it will succeed in obtaining a very substantial portion of the large potential market. (footnotes omitted)

[14] *Cf.* MCI Communications Corp. v. American Telephone & Telegraph Co., *supra*, 369 F. Supp. at 1013 ("Bell includes FX and CCSA in the category of private line service in their tariffs and in all of their private line sales literature, manuals, and the like.").

of private line services theretofore furnished by the established carriers.

Finally, we are persuaded by the broad language utilized by the Commission in Docket 18920 (1971). Aside from its repeated use of the generic phrase "private line service," the FCC stated (in its conclusion with regard to issue "E"):

> We reaffirm the view expressed in the Notice (paragraph 67) that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier. Moreover, as there stated, 'where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors.' In view of the representations of A T & T and G T & E in this proceeding, upon which we rely, and the self-interest of other independent telephone companies in not losing potential new business, there appears to be no need to say more on this question at this time. Should any future problem arise, we will act expeditiously to take such measures as are necessary and appropriate in the public interest to implement and enforce the policies and objectives of this Decision.

29 F.C.C.2d at 940 (1971). We read this statement as extending beyond "local loops," incorporating a general direction to the established carriers to enable the new entrants to provide the variety of private line services furnished in the past by the established carriers.

A T & T contends that the FCC's decisions in Dockets

18920 and 19896, as well as this Court's recent opinion in *MCI Communications Corp.* v. *A.T. & T., supra,* belie the assertion that FX and CCSA were contemplated by the *Specialized Common Carrier Services* decision. First, A T & T asserts that in Docket 18920, the Commission assumed that it was encouraging the development of new types of services. Inasmuch as FX and CCSA were already provided by A T & T and by independent carriers, A T & T suggests that the Commission was contemplating other, more unique services, in Docket 18920. While there is language in Docket 18920 indicating a concern with new, customized services, we interpret this language as referring not only to the types of services provided, but also to the delivery of private line services to ultimate customers who theretofore had been unable to obtain private line services fashioned to their particular needs.[15] Secondly, A T & T asserts that in Docket 19896, the Commission conceded that it had not ordered the provision of FX and CCSA in its 1971 rule-making proceeding. As discussed above (*see* p. 10, *supra*), the Commission did admit in Docket 19896 that the scope of its prior orders may not have been "perfectly clear" with regard to FX and CCSA. We treat this ad-

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[15] We note that in characterizing MCI's application, the Commission stated in its Notice of Proposed Rule-Making:

> According to MCI, the 'real distinction which delineates MCI service from anything provided today by existing common carriers is not the facility itself but the manner in which a customer may utilize it in order to provide a customized intra-company point-to-point communications system of his own design and capability.' For example, the customer may purchase the exact bandwidth required on a point-to-point basis (including one-way channels), utilize it in whatever transmission mode he chooses (voice or date, alternately or singly), mix different bandwidths on the same channel, use his own terminal equipment and install his own equipment on MIC towers and shelters, provide either analog or digital input signals, and avail himself of MCI's offering of channels designed especially for data use with rates based on transmission speed rather than bandwidth.

24 F.C.C.2d at 323.

mission as the product of the agency's conservative approach in Docket 19896, in no way undermining the Commission's holding that Docket 18920 contemplated the provision of FX and CCSA.[16] Thirdly, petitioner contends that our vacation of the affirmative injunction ordered by the district court in *MCI Communications Corp.* v. *A.T. & T., supra,* signifies disagreement with the district court's conclusion that Docket 18920 required A T & T to provide FX and CCSA to the specialized carriers. We reject any such reading of our opinion in *MCI.*[17] Inasmuch as jurisdiction was predicated upon a mandamus statute (47 U.S.C. § 406), at issue in *MCI* was the question of whether or not A T & T had a *clear and unequivocal* duty to provide FX and CCSA (and other services) as a result of prior FCC orders. Since the issue is technical in nature, and since the

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[16] In its "enforcement" proceeding (Docket 19896), the Commission explained unequivocally that it had intended to include FX and CCSA within its Docket 18920 "rule." The FCC stated that:

> The Specialized Common Carrier Services proceeding involved rulemaking for the determination of basic policies with respect to the provision of private line services by the specialized carriers. While FX and CCSA are not specifically mentioned in the Specialized Common Carrier Services decision, this is because we were concerned with private line services generally and did not specifically focus on interconnection for FX and CCSA services or any others. It should be noted that the Commission considered the possibility of the "total diversion" of Bell's private line revenues, although the possibility was deemed to be remote. We would not have discussed this remote possibility of a "total diversion" of Bell's private line services if the competition offered by the specialized carriers were not to include FX and CCSA services, which account for a substantial share of Bell's total private line revenues. These services come within the terms of our order, and rightly so, because there is no distinction in principle to separate them from other types of interconnection.

46 F.C.C.2d at 424-425.

[17] It should be noted that two of the three members of the panel in the instant case (Judges Weis and Garth) were members of the panel that decided MCI Communications Corp. v. A. T. & T.

Commission had announced that it was considering this precise question in its Docket 19896 proceedings, this Court held that the doctrine of primary jurisdiction precluded it from reaching the merits. *See MCI Communications Corp. v. A.T. & T., supra,* slip opinion at 17-19. We stated:

> Under the facts of this case, we have concluded that the district court erred in not staying any action by it, at the least after December 13, 1973, until the FCC had had an opportunity to act on its above-mentioned proceeding at Docket No. 19896 where argument was scheduled for and held on March 4, 1974, particularly because until that proceeding is resolved defendants will not have the 'clear and unequivocal duties' referred to above. . . .

Slip opinion at 11. Contrary to petitioner's argument herein that this Court has already resolved the FX/CCSA dispute, we decided only that:

> there was sufficient uncertainty concerning the existence and scope of A T & T's obligation to provide interconnections into the switched network . . . that the district court should have deferred to the FCC in determining exactly what private line services had been authorized by the FCC.

Slip opinion at 16.

We thus are unpersuaded by petitioner's arguments with regard to the scope of the proceedings in Docket 18920. We conclude that *Specialized Common Carrier Services* created in A T & T a duty to provide the specialized carriers with FX and CCSA. Accordingly, as to FX and CCSA, we view Docket 19896 (the instant case) as a device for enforcing previously articulated responsibilities, and not as an independent proceeding.

C. *Evidentiary Hearing*

At no time since the FCC's original *MCI* decision (*see*

p. 2, *supra*) has the Commission conducted an adjudicatory hearing with regard to the provision of private line services by the specialized common carriers. In Docket 18920 *(Specialized Common Carrier Services)*, the FCC undertook to resolve basic policy issues through "an overall policy and rule-making proceeding." [18] Accordingly, the Commission restricted input to (a) comments on issues raised in the Notice of Proposed Rule-Making, (b) oral argument, and (c) an opportunity to submit written rebuttal. Similarly, in the instant proceeding (Docket 19896), the parties did not enjoy an evidential hearing. Rather, they were limited to written comments (briefs) and one day of oral argument.

A T & T contends that the FX and CCSA orders on review herein are invalid in that they had not been preceded by an evidentiary hearing. Petitioner asserts that such a hearing is mandated by Section 201(a) of the Communications Act, 47 U.S.C. § 201(a), which provides that:

> (a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

Petitioner's argument is actually two-fold: A T & T argues that an evidentiary hearing is required either solely as a matter of statutory construction (in effect, a *per se* rule)

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[18] 29 F.C.C.2d at 871 (1971).

or as a result of the issues raised in the pleadings. We disagree.

1. Per Se *Statutory Construction*

We find nothing in the text of § 201(a) to indicate that interconnection orders must be preceded by an evidentiary hearing. The phrase "opportunity for hearing" lacks the reference to a "record" necessary to trigger the evidentiary requirements of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq. See United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 234 (1973); *United States Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972); *Duquesne Light Co.* v. *Environmental Protection Agency*, 481 F.2d 1, 6 (3d Cir. 1973). Indeed, the statutory phrase ("opportunity for hearing") is neutral: it no more requires an evidentiary hearing than does the equivocal phrase "proceeding." As the Supreme Court has recognized:

> The term "hearing" in its legal context undoubtedly has a host of hearings. Its meaning undoubtedly will vary, depending on whether it is used in the context of a rule-making type proceeding or in the context of a proceeding devoted to the adjudication of particular disputed facts.

United States v. *Florida East Coast Railway Co., supra*, 410 U.S. at 239.

A T & T does not offer legislative history to support its contention that the seemingly ambiguous phrase "opportunity for hearing" mandates an evidentiary hearing. Instead, petitioner relies upon past practices of the Federal Communications Commission. While we recognize that the Commission has previously extolled the utilization of adjudicative hearings in § 201 proceedings,[19] we do not believe that this "prior practice" is as significant as it claimed by

[19] *See* Western Union Telegraph Co., 17 F.C.C. 152, *reconsideration denied*, 17 F.C.C. 503 (1952).

A T & T. The Commission's former policy of evaluating interconnection on a case-by-case basis was not predicated upon a belief that § 201(a) required such a policy. Rather, it was developed as a matter of procedural policy, reflecting the Commission's view of the most efficacious and just method of administering interconnection petitions. In the absence of a statutory mandate, we see no reason to bind the Commission to this procedural policy. As technology develops and the field of communications changes, procedural, as well as substantive, policy must be flexible. The mere fact that an agency has once regarded evidentiary hearings as appropriate does not bar it from adopting another policy when changing or new circumstances require a different approach. *See Phillips Petroleum Co.* v. *Federal Power Commission,* 475 F.2d 842 (10th Cir. 1973), *cert. denied sub nom. Chevron Oil Company, Western Division* v. *Federal Power Commission,* 414 U.S. 1146 (1974). *Cf. Shapiro,* The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv.L.Rev. 921, 947-948 (1965). Accordingly, we do not regard the FCC's prior practice as dispositive of the type of "hearing" required by § 201(a).

We are persuaded instead that § 201(a) should be interpreted to permit procedures less formal and adversarial than the evidential hearing demanded by A T & T. Three factors lead us to this conclusion. First, as the Supreme Court has suggested in *FCC* v. *Pottsville Broadcasting Co.*[20] and in *In re Permian Basin Area Rate Cases,*[21] procedural flexibility can aid the FCC in making the substantive determinations that it is required to make under the Communications Act. To lock the FCC into one type of proceeding—be it evidentiary or otherwise—could jeopardize the ability of the Commission to determine the "public interest" in a given case. Second, we view the *"per se"*

[20] 309 U.S. 134 (1940).

[21] 390 U.S. 747, 777 (1968).

rule advanced by A T & T as being contrary to legislative command. Congress has empowered the FCC to "conduct its proceeding in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). This direction leaves to the agency the determination of the type of procedure to be employed in a particular case. The *per se* approach suggested by A T & T is at odds with this flexible, discretionary standard. Third, we recognize that several courts have come to favor rule-making over adjudication for the formulation of new policy. *See National Petroleum Refiners Association* v. *Federal Trade Commission*, 482 F.2d 672, 681-83 (D.C. Cir. 1973); *cert. denied* —— U.S. —— ( ); *WBEN, Inc.* v. *United States*, 396 F.2d 601, 618 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968); *American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F.2d 624, 630 (D.C. Cir. 1966) (en banc); *Long Island Railroad Co.* v. *United States*, 318 F. Supp. 490, 496 (E.D. N.Y. 1970) (three-judge court, per Judge Friendly). While there must be limits to this trend,[22] the rationale employed is logical and persuasive. Non-evidentiary rule-making permits broad participation in the decision-making process and enables an administrative agency to develop integrated plans in important policy areas. *See generally* Davis, Administrative Law Treatise, § 6.15 (1970 Supp.); Shapiro, the Choice of Rule naking or Adjudication in the Development of Administrative Policy, 78 Harv. L.Rev. 921, 930-42 (1965); Wright, the Courts and the Rulemaking Process: The Limits of Judicial Review, 59 Cornell L. Rev. 375, 376 (1974); *see National Petroleum Refiners Association* v. *Federal Trade Commission, supra*, 482 F.2d at 678-684. Accordingly, we choose not to read into § 201(a) a *per se* evidentiary hearing requirement in the absence of a clear statutory directive to conduct formal

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[22] *See, e.g.*, NLRB v. Bell Aerospace Co., Division of Textron, Inc., 42 U.S.L.W. 4564 (April 23, 1974).

adjudicatory hearings.[23] We therefore reject A T & T's contention that § 201(a) requires an evidentiary hearing as a condition precedent to *all* interconnection orders.

2. *Relationship of the Issues to the Form of Hearing*

Alternately, petitioner asserts that the nature of the issues before the Commission demand an evidentiary hearing *in the instant case.* Again, the argument is two-fold. A T & T contends that (1) the substantive significance of the policy issues and (2) the existence of genuine disputes with regard to material facts require the Commission to conduct an evidentiary hearing before ordering the established common carrier to provide FX and CCSA services to the specalized common carriers.

In evaluating these contentions, it is important to keep in mind the legal framework. As discussed above, we are dealing with a statute that does not mandate a particular form of proceeding for all cases. Instead, § 201(a), as construed in conjunction with § 154(j), leaves the choice of appropriate procedure to the FCC. In the absence of a *per se* statutory directive, the type of procedure chosen must be related to the kinds of issues involved. *See Walter Holm & Co.* v. *Hardin,* 449 F.2d 1009, 1015 (D.C. Cir. 1971). As both petitioner and respondent have recognized, several "rules of thumb" have developed to correlate procedures with particular types of cases. Nevertheless, the ultimate choice of procedure (in the absence of a statutory mandate) is left to the discretion of the agency involved, and will be reversed only for an abuse of discretion. *See NLRB* v. *Bell Aerospace Co., Division of Textron, Inc.,* 42 U.S.L.W. 4564, 4571-73 (April 23, 1974); *Security & Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, 203 (1947). Accordingly, we must determine whether the

[23] At least one other Circuit has demonstrated a similar reticence to prohibit the use of non-evidentiary hearings in the absence of a clear Congressional mandate. *See* American Airlines, Inc. v. CAB, 359 F.2d 624, 629 (D.C. Cir. 1966) (en banc); *cf.* National Air Carrier Association v. CAB, 436 F.2d 185, 194 (D.C. Cir. 1970).

FCC abused its discretion in ordering the provision of FX and CCSA services without first conducting an evidentiary hearing.

A T & T argues that the scope, importance and complexity of the policy issues involved herein require an evidentiary hearing. Courts have, at times, indicated that evidentiary hearings are necessary to resolve issues of great substantive importance. *See, e.g., Appalachian Power Co.* v. *Environmental Protection Agency,* 477 F.2d 495, 501 (4th Cir. 1973); *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission,* 420 F.2d 577, 585-86, n.22, 589, n.36 (D.C. Cir. 1969); *Citizens for Allegan County, Inc.* v. *Federal Power Commission,* 414 F.2d 1125, 1128-29 (D.C. Cir. 1969). We decline to follow this line of cases.

When an administrative agency develops a general policy applicable on a prospective basis, courts have found it unnecessary to require evidentiary hearings. *See, e.g., United States* v. *Florida East Coast Railway Co.,* 410 U.S. 224, 244-46 (1973); *Duquesne Light Co.* v. *Environmental Protection Agency,* 481 F.2d 1, 7 (3d Cir. 1973); *International Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615, 630 (D.C. Cir. 1973). This reluctance to prescribe evidentiary hearings on matters of general policy is grounded largely in practical considerations. Evidentiary hearings become "totally unmanageable" when parties attempt to cross-examine the large numbers of persons normally interested in the development of policy. *See, Virgin Islands Hotel Association* v. *Virgin Islands Water & Power Authority,* 476 F.2d 1263, 1268 (3d Cir. 1973). As the Second Circuit has explained:

> Adjudicatory hearings serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more about this than anyone else. But when, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the

agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them.

WBEN, Inc. v. *United States,* 396 F.2d 601, 618 (2d Cir.), *cert. denied,* 393 U.S. 914 (1968). *Compare Bi-Metallic Investment Co.* v. *State Board of Equalization,* 239 U.S. 441 (1915) *with Londoner* v. *Denver,* 210 U.S. 373 (1908).

We see no reason to depart from the doctrine articulated in *Duquesne Light Co., Virgin Islands Hotel Association,* and *WBEN* merely because the policy questions at issue are of special importance or complexity. *Accord: National Air Carrier Association* v. *Civil Aeronautics Board,* 436 F.2d 185, 194 (D.C. Cir. 1970) ("The fact that these questions are difficult and important, however, does not mean that an evidentiary hearing is an essential prerequisite to their satisfactory resolution."); *cf. National Petroleum Refiners Association* v. *Federal Trade Commission, supra,* 482 F.2d at 683-684. A T & T has emphasized in the proceedings before this Court that the FCC's order to provide FX and CCSA services to specialized carriers represents a dramatic new development in communications policy. It is precisely in this type of action that the agency *should be given* the greatest degree of latitude in conducting proceedings consonant with the goals of efficient decision-making and responsible "public interest" administration. Accordingly, we conclude that the mere significance and complexity of the policy issues before the FCC in Dockets 18920 and 19896 do not render the Commission's rejection of evidentiary hearings an abuse of discretion.[24]

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[24] NLRB v. Bell Aerospace Co., Division of Textron, Inc., 42 U.S.L.W. 4564 (April 23, 1974), *aff'g in part, rev'g in part,* 475 F.2d 485 (2nd Cir. 1973), is not to the contrary. In *Bell Aerospace,* the Second Circuit held that the Labor Board erred in conducting adjudicatory (rather than rule-making) procedures to develop policy at odds with prior policy positions of the Board. The Supreme Court's reversal does not suggest (as A T & T would

A T & T does, however, offer a second ground in support of its demand for an evidentiary hearing. Petitioner asserts that material factual issues exist and require adjudicatory proceedings. The factual issues relate primarily to the difficulties which A T & T anticipates upon interconnecting with the specialized carriers. In particular, A T & T contends that the Commission should have conducted evidentiary hearings to evaluate the established carriers' claims that interconnection (for FX and CCSA services) will: (1) impair the efficient operation of A T & T's switched network, (2) lead to substantial costs to the public, and (3) jeopardize the operation of all telephonic communications in the event of faulty performance in the specialized carriers' lines.

Generally, the existence of material factual issues requires an agency to conduct evidential hearings. *See, e.g., Air Line Pilots Association, International* v. *C.A.B.,* 475 F.2d 900, 904 (D.C. Cir. 1973); *Marine Space Enclosures, Inc.* v. *F.M.C.,* 420 F.2d 577, 589, n.36 (D.C. Cir. 1969).[25] There are, however, important exceptions to this general rule. Professor Davis distinguishes between two types of factual disputes: those which can and those which cannot

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have us hold) that rule-making was inappropriate and that evidentiary hearings were required. Instead, the Court held only that the NLRB had not abused its discretion in opting for an adjudicatory procedure. 42 U.S.L.W. at 4571-73. Our holding in this case is entirely consistent with the Supreme Court's affirmation of agency discretion in procedural matters.

[25] On the other hand, it is well settled that there is no need for an evidentiary hearing when there is no material factual dispute involved. *See, e.g.,* Denver Union Stock Yard Co. v. Producers Livestock Marketing Association, 356 U.S. 282 (1958); Appalachian Power Co. v. E.P.A., 477 F.2d 495, 501 (4th Cir. 1973); Municipal Light Boards v. F.P.C., 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 989 (1972); Upjohn Co. v. Finch, 422 F.2d 944, 955 (6th Cir. 1970); Citizens for Allegan County, Inc. v. F.P.C., 414 F.2d 1125, 1128 (D.C. Cir. 1969) (and cases cited at 1128, n.5).

be "decisively resolved" by evidentiary submissions. Davis, Administrative Law Treatise, § 7.06 (1958 ed.). While those which can be decisively resolved ("adjudicative facts") should be subject to evidentiary hearings, those which do not lend themselves to evidentiary resolution ("legislative facts") obviously do not require adjudicatory proceedings. *See SEC* v. *Frank,* 388 F.2d 486, 491-492 (2d Cir. 1968); *American Airlines, Inc.* v. *CAB,* 359 F.2d 624, 633 (D.C. Cir.) *cert. denied* 385 U.S. 843 (1966); *cf. Virgin Islands Hotel Association* v. *Virgin Islands Water & Power Authority,* 476 F.2d 1263, 1268 (3d Cir. 1973).

We do not believe that the factual issues alleged by A T & T require an evidentiary hearing. Indeed, of all the parties to this dispute. A T & T stands in the best position to resolve these issues outside of an adjudicative forum. In submitting tariffs for the provision of FX and CCSA services to the specialized carriers, A T & T may require the specialized carriers to satisfy reasonable conditions for their use of A T & T's switched network. A T & T thus can protect itself against the technical difficulties which it has requested the Commission to evaluate. If the FCC believes that the tariffs ultimately filed result in too high a cost, the Commission has ample authority to suspend and review the tariffs. Given the nature of these issues, we hold that the Commission did not abuse its discretion in denying an adjudicatory "airing" of the claims raised by A T & T.

In reaching this conclusion, we are especially mindful of the ultimate issue before us. We are not overly concerned with drawing a "bright line" between adjudication and rule-making.[25] Regardless of the label and the procedure

[25] We have previously noted that:

An attempt to draw a bright line between situations requiring adjudicative hearings and those calling for rule-making is a task often unresponsive to the actual problems presented in a given case. Rather, a growing body of case law and scholarly

utilized, "the ultimate standard against which we must evaluate the fairness of the proceedings is due process of law." *Hoffman-LaRoche, Inc.* v. *Kleindienst*, 478 F.2d 1, 12 (3d Cir. 1973). Upon our review of the record, we are convinced that the procedures utilized by the Commission pass constitutional muster. A T & T was given two separate opportunities (Dockets 18920 and 19896) to dissuade the FCC from ordering FX and CCSA interconnection. In both proceedings A T & T was given notice of the Commission's intentions[27] and was afforded the opportunity to present its arguments against the proposed interconnection. Inasmuch as petitioner can legitimately claim neither surprise nor denial of the opportunity to speak meaningfully to the issues before the Commission, we must reject the contention that A T & T was denied the "opportunity for hearing" required by § 201(a) and by due process of law.[28]

D. *Substantive Validity of the FX and CCSA Orders*

Petitioner contends that the FX and CCSA orders (see Appendix) are substantively invalid. In advancing this contention, A T & T argues first that the Commission was not entitled to rely upon *Specialized Common Carrier Services* (Docket 18920; 1971) to support its FX and CCSA orders. Second, it argues that the Commission has not yet

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discussion has indicated that hybrid proceedings, tailored to the types of issues contested, appear to be a salutary alternative to efforts to sketch a rigid demarcation. (footnotes omitted)

Duquesne Light Co. v. E.P.A., 481 F.2d 1, 5-6 (3d Cir. 1973).

[27] The sufficiency of the notice regarding Docket 18920 is discussed at p. 35, *infra*.

[28] In reaching this conclusion, we also reject A T & T's arguments: (1) that the Commission's focus upon an individual carrier required an evidentiary hearing, and (2) that the FCC did not follow proper rule-making procedures. Both of these arguments are predicated upon the characterization of Docket 19896 as an independent proceeding, a characterization which we have rejected (*see* pp. 17-25, *supra*).

found that FX and CCSA interconnection would be in the public interest. We hold both of these assertions to be without merit.

1. *Specialized Common Carrier Services* (Docket 18920; 1971)

Viewing Docket 19896 (1974) as an independent proceeding, and characterizing *Specialized Common Carrier Services* (Docket 18920; 1971) as unrelated to FX and CCSA, petitioner argues that the Commission's reliance in Docket 19896 upon the former proceeding invalidates the 1974 FX and CCSA order. We do not agree. Since we have found that *Specialized Common Carrier Services* (Docket 18920; 1971) contemplated the provision of FX and CCSA services,[29] there can be no error in the FCC's relying upon this decision in forcing its previously announced mandate.

As an alternate argument, A T & T argues that even if the Commission did order FX and CCSA interconnection in Docket 18920 (1971), the failure to notify A T & T in advance of the Commission's intention to include FX and CCSA interconnection within the rulemaking proceeding precludes subsequent reliance in Docket 19896 upon Docket 18920. The Notice of Proposed Rulemaking in Docket 18920 (24 F.C.C.2d 318) belies this contention. Although the Commission speaks in general terms in the Notice, we conclude that the general references to private line services were sufficient to give A T & T the requisite notice as to FX and CCSA services. In support of this conclusion, we note that the Commission's staff analysis, reproduced in the Notice (in Docket 18920), analyzed "diversion" as follows:

> It is important to recognize that we are concerned with only a relatively small percentage of established common carrier service to the public. For example,

[29] *See* pp. 17-25, *supra*.

> A T & T's present interstate business constitutes only about 30 percent of the Bell System's total business; about 87 percent of the interstate revenue is from message toll telephone and wide area telephone service (WATS), and these latter services have an annual growth rate of about 15 percent. None of the applicants propose to provide this type of service and we see no reason to expect any undesirable effects upon these services. *An examination of A T & T's private line, program transmission and other more specialized services indicates that an estimate of the proportion of A T & T services that is vulnerable to competitive inroads would be on the order of 2-4 percent of its existing total business.* (footnotes omitted) (emphasis added).

24 F.C.C.2d at 335. Simple mathematics indicates that this "2-4 percent of [A T & T's] existing total business" represents all interstate revenue earned from sources other than message toll telephone and wide area telephone services. This 2-4 percent must perforce include A T & T's revenue derived from interstate FX and CCSA services. The Commission's analysis, and its reference to these percentages, demonstrates that the Commission was contemplating the provision of FX and CCSA services by the specialized carriers. In further support of our conclusion, we also note that the FCC, in discussing local loop service, spoke expansively of the duty of the established carriers:

> In the MCI case, the Commission retained jurisdiction over the interconnection issue, stating that an order requiring the established carriers to provide loop service would be issued unless it is shown that interconnection is not technically feasible (18 FCC2d at 965; 21 FCC2d at 193). The local exchange facilities of the Bell System and independent telephone com-

panies presently constitute almost the sole means for local distribution of interstate common carrier services (apart from CATV and broadcast facilities). Western Union is almost entirely dependent on the Bell System for its local distribution. If access to local facilities is requested and needed by the applicants, we would expect the local carrier—Bell or other carrier—to permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers. *In other words, where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors.* Customers of any new carrier should also be afforded the option by the local carrier to obtain local distribution facilities under reasonable terms set forth in the tariff schedules of the latter. (footnote omitted) (emphasis added).

24 F.C.C.2d at 347. If this passage connotes nothing else, it indicates that the Commission intended the established carriers to provide to the specialized carriers the same services (at the same rates) as those provided to A T & T's affiliates. As A T & T had long provided FX and CCSA interconnection to its affiliates, it should have recognized that the Commission would order the furnishing of these services on a non-discriminatory basis. Accordingly, we reject the alternate contention that A T & T did not receive the requisite notice in Docket 18920 (1971).

We therefore conclude that the Commission was fully justified in relying upon *Specialized Common Carrier Services* (Docket 18920; 1971) in the instant (enforcement) proceeding.

2. *Public Interest Findings*

Section 201(a) of the Communications Act requires (as a condition precedent to the issuance of interconnection orders) that the FCC make a finding that the proposed

interconnection will be "necessary or desirable in the public interest." AT&T suggests that the FX and CCSA orders contravene this statutory directive, asserting: (1) that the FCC has never determined that the furnishing of FX and CCSA services to the specialized common carriers would be in the public interest, (2) that even if such a finding were made, its reliance upon competition contravenes *FCC* v. *RCA Communications, Inc.*[20] and *Hawaiian Telephone Co.* v. *FCC*,[21] and (3) that even if such a finding were made and not violative of *RCA* and *Hawaiian Telephone*, the failure of the Commission to indicate its rationale vitiates the required public interest finding.

AT&T's first and third assertions are undermined by *Specialized Common Carrier Services*, (Docket 18920). The primary issue considered by the FCC in Docket 18920 was whether, as a matter of policy, it was in the public interest to permit "the entry of new carriers in the specialized communications field." 29 F.C.C. at 878. As we have previously discussed, the Commission focused upon the *full field* of private line services theretofore provided by the established carriers. The Commission's evaluation demonstrated that the public interest favored the entry of specialized carriers into the full field of private line services. After analyzing its staff's conclusions with regard to the nature of the market, the public's demand for specialized services, the benefits to be expected from new entry, and the likely impact upon the established carriers, the Commission held as follows:

> We find that: there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have

[20] 346 U.S. 86 (1953).

[21] No. 73-1018 (D.C. Cir., filed May 3, 1974).

> any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry. We further find and conclude that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.

29 F.C.C.2d at 920. Although the Commission does not mention FX and CCSA by name, we regard the above holding as including an amply-supported finding that the public interest favors the furnishing of FX and CCSA interconnection to the specialized carriers.

A T & T's attempt to invoke *FCC* v. *RCA Communications, Inc., supra,* is similarly without merit. In *RCA*, the FCC had authorized the opening of new circuits because of "the national policy in favor of competition." 346 U.S. at 89. The Supreme Court vacated the agency's order, concluding that the FCC may not authorize new circuits merely in order to foster competition. The Court held that for the FCC to perform its statutory responsibilities, it must at least relate competition to the public interest. In the course of criticizing the Commission for relying solely upon competition, the Court explained that competition could be considered as a "relevant factor in weighing the public interest." 346 U.S. at 94. Indeed, Justice Frankfurter explained at great length the extent to which the FCC could consider competition in evaluating the "public interest." He stated:

> "We think it not inadmissible for the Commission, when it makes manifest that in so doing it is conscientiously exercising the discretion given it by Congress, to reach a conclusion whereby [license] authorizations would be granted wherever competition is reasonably feasible. . . . In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of

tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.' *Far East Conf.* v. *United States*, 342 U.S. 570, 575. In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, cf. *Labor Board* v. *Seven-Up Co.*, 344 U.S. 344, 348, but *the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it.*" (emphasis added)

346 U.S. at 96-97. *See also Hawaiian Telephone Co.* v. *FCC*, No. 73-1018 (D.C. Cir., filed May 3, 1974).

Specialized Common Carrier Services (Docket 18920) fully comports with the principles articulated in *RCA*. First, the Commission relied upon factors other than competition in making its public interest determination. Specifically, the FCC noted that (1) the specialized communications market is expanding, and that (2) the demand for specialized communications service is growing. 29 F.C.C.2d at 904-08. Second, following Justice Frankfurter's lead, the Commission concluded and warranted that benefits were reasonably to be anticipated as a result of the entry of new specialized carriers into the market. Quoting from the Notice of Proposed Rule-Making, the FCC identified the following benefits:

(1) "By permitting the entry of specialized carriers, we would provide users with flexibility and a wider range of choices as to how they may best satisfy their

expanding and changing requirements for specialized communication service" (Notice, paragraph 30).

(2) "There is also a question as to whether the existing carriers can meet the requirements in the specialized markets promptly, efficiently and effectively without prejudice to full and timely satisfaction of the increasing requirements of the public monopoly services. The responsibility for meeting the nation's growing and changing communications requirements is now largely concentrated in the Bell System. This responsibility is becoming more and more difficult to discharge in a manner which enables the Bell System to satisfy timely and effectively all existing and anticipated communications requirements. This is partly because of the diversity of such requirements, the obvious problems of designing and engineering facilities capable of meeting all such requirements with equal efficiency, economy and expedition, and the huge and increasing amounts of new capital the Bell System must raise for construction purposes. The entry of new carriers would have the effect of dispersing somewhat the burdens, risks and initiatives involved in supplying the rapidly growing markets for new and specalized services among a multiplicity of entrepreneurs who appear ready, willing and able to assume these undertakings. It would also expand the capability of the communications industry to respond to the challenge of meeting the rapidly, growing and varied demands of communications users" (Notice, paragraph 32).

(3) "Further, while economies of scale may result when large general purpose transmission facilities can be used to meet relatively homogeneous communications requirements, there may be other drawbacks. The sheer size of the A T & T organizational structure, its enormous financing requirements, its vertical integration, and near monopoly position in the provision of communications services may make it slower to

perceive and respond to individual, specialized requirements and to initiate market and technical innovations. [Footnote omitted.] Competition in the specialized communications field would enlarge the equipment market for manufacturers other than Western Electric, and may stimulate technical innovation and the introduction of new techniques. Moreover, new carriers with smaller scale operations could devote their undivided attention to the particular needs to be served and, lacking a captive market, would be under pressure to innovate to produce those types of services which would attract and retain customers" (Notice, paragraph 34).

(4) "In an industry of the size and growing complexity of the communications common carrier industry, the entry of new carriers could provide a useful regulatory tool which would assist in achieving the statutory objective of adequate and efficient services at reasonable charges. Competition could afford some standard for comparing the performance of one carrier with another. Moreover, competitive pressure may encourage beneficial changes in A T & T's services and charges in the specialized field, and stimulate counter innovation or the more rapid introduction of new technology" (Notice, paragraph 35).

29 F.C.C.2d at 909-10. We regard the listing of factors (independent of competition) and the identification of benefits (reasonably expected) as proof that the FCC viewed competition as a means, rather than as a goal in and of itself, in Docket 18920. Accordingly, we reject petitioner's *RCA* contention and hold that the FCC has made the requisite "public interest" findings.

E. *Overbreadth*

It is undisputed that the FCC has the responsibility to articulate its orders in clear and precise terms, avoiding

reasonable doubts as to their ultimate meaning. *See FTC* v. *Broch & Co.*, 368 U.S. 360, 367-368 (1962); *FTC* v. *Cement Institute*, 333 U.S. 683, 726 (1948). A T & T contends that the Commission has not fulfilled this responsibility in the instant case.[31a] Specifically, A T & T asserts that in requiring it to permit any physical connections "essential" to the rendition of "all" private lines services which any of the specialized carriers "presently or hereafter" are authorized to offer (*see* Appendix, ¶ 53a), the Commission has imposed an *unbounded* interconnection order. A similar objection is lodged against the agency's order to cease and desist from engaging in "any conduct" which will result in

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[31a] The United States Independent Telephone Association, (USITA) an intervenor, advances its own separate overbreadth argument. In Docket 19896, the Commission stated:

> The show cause order in this proceeding was directed only to American Telephone and Telegraph Company and to the Bell System operating companies. Consequently, cease and desist orders are appropriate only against such companies and will not be issued against any non-Bell companies. However, we wish to place all telephone companies on notice that our policy declarations with respect to interconnection apply to them as well as to the Bell companies. We also emphasize that we expect compliance by all telephone companies with such policy declarations and the orders issued pursuant thereto in the absence of a substantial showing that a particular request for interconnection would result in damage to the telephone system or is otherwise inconsistent with the public interest. Should such compliance not be forthcoming, the offending company will be made the subject of a show cause proceeding or other appropriate remedial action will be taken expeditiously.

46 F.C.C.2d 437. USITA claims that since the Docket 19896 proceedings involved only interconnection between A T & T and the specialized carriers, the extension to specialized carrier-independent carrier interconnection is unfounded. We disagree. The above quoted paragraph primarily reminds the independent carriers that they are subject to the policies announced in Specialized Common Carrier Services, 29 F.C.C.2d 870 (1971). Any objections that the independent carriers have with specific matters of interconnection may be raised before the FCC in separate proceedings and accordingly are not before this Court at the present time.

a delay or denial of services "presently or hereinafter" authorized (*see* Appendix, ¶ 54a).

Were we to read the Commission's order in a vacuum, we would be inclined to agree with petitioner that the order is somewhat vague and, to a certain extent, overboard. On its face, the order gives little guidance as to the types of services that A T & T will be required to provide "hereafter."

Nevertheless, we find it unnecessary to remand on this ground. Orders are not to be read in a vacuum, but rather must be read and interpreted in the context in which they appear. *See FTC* v. *Cement Institute, supra,* 333 U.S. at 729. Viewed in its entirety, the FCC's opinion in Docket 19896 operates to preclude A T & T from treating its Long Lines Department and its affiliates differently than it treats the specialized common carriers. The Commission noted that in previous proceedings, "our action was taken to insure that competition in the provision of interstate private line communications would be on a full, fair, and non-discriminatory basis. . . ." 46 F.C.C.2d at 426. Similarly, the FCC identified as its primary objective in Docket 19896 a communications market in which private line services are provided on a "full, fair, and non-discriminatory basis." 46 F.C.C.2d at 427. Given this concern with non-discriminatory treatment, the FCC's order takes on a definite meaning. As we read the order, the FCC has required A T & T to provide to the specialized carriers those (interconnection) elements of private line services which A T & T supplies to its affiliates and furnishes to customers through its Long Lines Department. We believe that such an order is authorized by 47 U.S.C. § 201(a) and is supported by the Commission's opinion in Docket 19896.

Accordingly, we reject A T & T's contention that the order herein is impermissibly sweeping, undefined, and unsupported.

II. *Western Union Contracts*

A. *Background*

At least since 1928, Western Union has leased local distribution facilities from A T & T pursuant to privately negotiated "exchange of facilities" contracts.[32] These contracts are indefinite in term, but provide that either party may terminate upon five years' notice. In September of 1973, A T & T gave notice of its intention to terminate the contracts. Rather than honor such contracts until 1978, however, A T & T attempted to rescind the contracts at once by filing what it hoped would be superseding tariffs.[33] At first, A T & T filed these tariffs with various state regulatory commissions, but, upon FCC order, A T & T also filed the tariffs with the FCC, albeit under protest.

On November 1, 1973, Western Union complained to the FCC, charging that A T & T's tariff practices were unlawful and incapable of superseding the privately negotiated contracts between A T & T and the complainant. The FCC responded to this complaint in its December 13th memorandum opinion and order to show cause.[34] *Bell System Tariff Offerings,* 44 F.C.C.2d 245 (1973), *modified,* 44 F.C.C.2d 912 (1974) (Docket 19896). In its December 13th opinion, the Commission, after noting that the tariffs and contracts might not be mutually exclusive, ordered A T & T to abide by the contract rates pending the Commission's decision as to whether the contracts could lawfully be

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[32] The phrase "exchange of facilities" is apparently a misnomer. A T & T does not receive equipment in return for its facilities, but instead receives monetary compensation. Thus, the contracts at issue more resemble leases than actual "exchange of facilities" contracts.

[33] In a letter dated September 28, 1973, A T & T announced to Western Union its intention to file tariffs to cover services normally provided for under the "exchange of facilities" contracts.

[34] *See* p. 14, *supra.*

superseded by a subsequent tariff filing. Furthermore, A T & T was ordered to show cause why it should not cease and desist from:

> "(a) altering, in any way, the provisions of exchange facilities contracts with Western Union, except in strict accordance with the terms of such contracts. . . ."

44 F.C.C.2d at 251.

A T & T's responses were insufficient to convince the Commission. Relying upon Supreme Court decisions construing the National Gas Act and the Federal Power Act, the FCC concluded (in its opinion released on April 23, 1974) that "Bell cannot supersede, modify, or terminate its contracts with Western Union merely by filing tariffs or taking other unilateral action." 46 F.C.C.2d at 432. The Commission therefore rejected the A T & T tariffs to the extent that the tariffs applied to interconnection facilities and services covered by the privately negotiated contracts.[35] A T & T petitions for review.

B. *The Conflicting Precedents*

Both before the Commission and before this Court, petitioner and Western Union (as an intervenor) have relied upon seemingly inconsistent case law. A T & T placed primary reliance upon *Armour Packing Co.* v. *United*

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[35] The Commission did note that the contracts presented certain difficulties. Western Union complained that the tariff rates far exceeded the contract rates. If, as Western Union alleges, the tariff rates are unreasonably high, this means that all other carriers (who would be bound by the tariffs) are paying excessive rates. If, on the other hand, the differential between the contract and tariff rates is justifiable, this can only mean that Western Union's low rates confer upon it an unlawful preference. The FCC therefore announced in its April 24th decision that it would institute separate proceedings "to determine whether the contract or tariff rates are unreasonably high, unreasonably low, or otherwise discriminatory."

States [36] to demonstrate that its tariffs may lawfully supersede previously negotiated contracts. Western Union, in response, cites *United Gas Co.* v. *Mobile Gas Corp.*[37] and *Federal Power Commission* v. *Sierra Pacific Power Co.*,[38] to support the FCC's rejection of the tariffs.

In *Armour*, the question arose as to whether a tariff could supersede a contract entered into between a railroad and a shipper (i.e., a customer). The Court found that the tariff applied, noting that the purpose of the law (i.e. the Interstate Commerce Act) "is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate [be] equally known by and available to every shipper." 209 U.S. at 80.

A contrary result was reached by the Supreme Court in *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956). Construing the Natural Gas Act,[39] the Court held that a gas company could not unilaterally alter a contract with a distributing company by filing a new tariff with the Federal Power Commission. The Court's holding was premised upon the principle that unilateral modification would be permissible only if authorized by the contract in question or by the Natural Gas Act. After finding that the contract was silent on this issue, the Court analyzed the structure of the Gas Act. Recognizing that the Gas Act requires gas companies to file all contracts with the FPC and authorizes the FPC to modify unreasonable contracts, the Court construed the Act to permit ". . . the relations between the parties to be established initially by contract, the protection of the public interest being af-

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[36] 209 U.S. 56 (1908).

[37] 350 U.S. 332 (1956).

[38] 350 U.S. 348 (1956).

[39] 15 U.S.C. § 717 *et seq.*

forded by supervision of the individual contracts, which to that end must be filed with the Commission and made public." 350 U.S. at 339. Given this scheme, the Court concluded that "there is nothing in the structure or purpose of the Act from which we can infer the right, not otherwise possessed and nowhere expressly given by the Act, of natural gas companies unilaterally to change their contracts." 350 U.S. at 343-44. The Court reached a similar result with regard to the Federal Power Act [40] in *FPC* v. *Sierra Pacific Power Co., supra.*

While *Armour* and *Mobile* appear at first blush to be wholly inconsistent, they are distinguishable. In *Armour,* the Court emphasized the fact that the Interstate Commerce Act prescribes uniform rates for shippers [41] and therefore cannot permit rates to be set haphazardly by contract. The regulatory statutes confronting the Court in *Mobile* and *Sierra Pacific* are different: uniform rates are not prescribed. Unlike the Interstate Commerce Act, the Natural Gas Act and the Federal Power Act permit rates to be set by contract. Justice Harlan, writing for a unanimous Court in *Mobile,* recognized this very distinction. He wrote:

> The prior decisions of this Court cited by petitioners as requiring an opposite result are readily distinguishable. In Armour Packing Co. v. United States, 209 U.S. 56, a rate contract between a railroad and a shipper at the filed rates in effect at the time the contract was made was held not to justify payment at the

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[40] 16 U.S.C. § 791a *et seq.*

[41] The Court noted that (under the Commerce Act):

> One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute.

209 U.S. at 81.

> contract rate for shipments made after the filed rates for shipments of that character had been increased by the railroad. The very basis for that decision, however, was the requirement of the Interstate Commerce Act that rates to all shippers be uniform and comply with the single tariff filed with the Commission, there being no provision under that Act for the filing of individual contracts. That is, the Interstate Commerce Act by its own force precluded contracts for rates different from those applicable to other shippers. The Natural Gas Act, on the other hand, recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as a part of the rate schedules. No contention is made here that the fact that the Mobile contract was at a rate different from that to other customers in itself made the contract illegal or that—as held in Armour—United could not lawfully have complied with the contract had it wanted to.

350 U.S. at 345. The problem raised by the instant case thus lies not in reconciling *Armour* and *Mobile,* but rather in determining which precedent should stand as a model to resolve the controversy between Western Union and A T & T.

C. *The Instant Case*

In urging this Court to adopt *Armour,* A T & T emphasizes the fact that the Communications Act was patterned upon the Interstate Commerce Act.[42] Without questioning this legislative history, we nevertheless are compelled to find that the instant case and *Armour* are distinguishable. As discussed above, the holding in *Armour* that a tariff could supersede a contract was predicated upon the fact that the Interstate Commerce Act does not envison that shippers' rates will be set by contract. While communica-

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[42] *See* S. Rep. No. 781, Committee on Interstate Commerce, 73d Cong., 2d Sess. (1934) at 2.

tions carriers may similarly be prohibited from contracting with customer-users, we find no such directive barring contractual relations between independent carriers.

Indeed, our analysis of the Communications Act leads us to the conclusion that the A T & T—Western Union contracts (unlike the carrier-shipper contract in *Armour*) represent a legitimate method of ordering business relations under Congress' regulatory legislation. Section 203 (c) of the Act provides that:

> No carrier, *unless otherwise provided by or under authority of this chapter,* shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule. (emphasis added)

47 U.S.C. § 203(c). The caveat in the above provision is critical: carriers must operate by tariff *unless otherwise authorized by the Act.* Such authorization is clearly found in Section 201(b) of the Act, which provides in part, that:

> . . . [N]othing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest. . . .

47 U.S.C. § 201(b). In the instant case, § 201(b) is of course not dispositive, since both A T & T and Western Union are carriers "subject to this chapter." Nevertheless, when viewed with still another provision of the Act, § 201(b) takes on some importance. Section 211(a) of the Communications Act provides that:

> Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

47 U.S.C. § 211(a). While § 201(b) speaks only of contracts between a regulated and non-regulated carrier, section 211(a) goes beyond that limited class. Section 211(a) requires the filing of *two* classes of contracts: contracts between two or more (regulated) carriers *and* contracts involving a regulated carrier and a non-regulated carrier. We read §211(a) as providing another exception to the general rule of § 203(b): carriers regulated by the Act may order their business relations by contract as well as by tariff.

A T & T concedes that § 211(a) does allow some private-ordering-by-contract as between carriers regulated by the Act. (Petitioner's Brief at 54). However, A T & T contends that its leasing contracts are not of the type described in § 211(a).[43] In support, A T & T points to a Regulation identifying types of contracts contemplated by § 201(a) and argues that a leasing contract is not included. This Regulation provides:

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[43] A T & T emphasizes the fact that it has not filed the original copy of its Western Union contracts with the FCC, but rather has merely filed a photo-copy of same. We fail to appreciate any real significance in this assertion.

(a) Each communication common carrier shall file with the Commission, within thirty (30) days of execution (or within 30 days of a carrier first becoming subject to the provisions of this section), a copy of each contract, agreement, concession, license, authorization, or other arrangement to which it is a party with respect to communication traffic affected by the Communications Act of 1934, as amended, relating to the following:

(1) The exchange of services between such carrier and any carrier not subject to the act;

(2) Except as provided in paragraph (e) of this section, the interchange or routing of traffic and matters concerning rates, division of tolls, or the basis of settlement of traffic balances; or

(3) Rights granted to the carrier by any foreign government for the landing, connection, installation, or operation of cables, land lines, radio stations, offices, or for otherwise engaging in communication operations.

(c) Except as provided in paragraph (e) of this section, a copy of each modification, amendment, or cancellation of any instrument required to be filed under the provisions of paragraph (a) of this section shall likewise be filed within thirty (30) days after execution.

(c) Except as provided in paragraph (c) of this section, if any contract, agreement, concession, license, authorization, or other arrangement, or change therein, as contemplated in paragraphs (a) and (b) of this section, is made other than in writing, a certified statement covering all details thereof shall be filed within thirty (30) days from the date it is made.

(d) Except as provided in paragraph (e) of this section, upon the filing of any item required by para-

graphs (a) and (c) of this section by one or two or more carriers subject to these provisions, each other party to the agreement may, in lieu of also filing a copy thereof, file a certified statement appropriately identifying the document and concurring in the contents thereof, as filed.

(e) With respect to contracts coming within the scope of paragraph (a)(2) of this section between subject telephone carriers and connecting carriers, except for those which relate to communications with foreign or overseas points, such contracts shall not be filed with the Commission; but each subject telephone carrier shall maintain a copy of such contracts to which it is a party in appropriate files at a central location upon its premises, copies of which contracts shall be readily accessible to Commission staff and members of the public upon reasonable request therefor; and upon request by the Commission, a subject telephone carrier shall promptly forward individual contracts to the Commission.

47 C.F.R. § 43.51.

We are unpersuaded by A T & T's argument. Contrary to petitioner's position, it may well be that the Western Union contracts fit within 47 C.F.R. § 43.51(a)(2), since the contracts do establish rental rates. Of more importance, there is nothing in the above Regulation indicating that it contains an exclusive list of all the various types of contracts contemplated by § 211(a). The statute itself suggests no such limited interpretation; section 211(a) is written in terms of "all" contracts. The legislative history, too, indicates that Congress intended *all* intercarrier contracts to be filed with the Commission. In explaining the various sections of the Communications Act, a House Committee wrote:

> Section 211(a) requires filing of all contracts between carriers engaged in the communications business and

between communication companies and other common carriers not covered by this bill.

H.R. No. 1850, 73d Cong., 2d Sess. at 6 (1934). We conclude that section 211(a) requires the filing of contracts such as the A T & T—Western Union contracts at issue. It follows from this conclusion that the Act permits A T & T and Western Union to provide for the leasing of facilities by contract, as well as by tariff.[44] *See United Gas Co.* v. *Mobile Gas Corp., supra,* 350 U.S. at 338 ("by requiring contracts to be filed with the Commission, the [Natural Gas] Act expressly recognizes that rates to particular customers may be set by individual contracts."). *Armour* is therefore distinguishable.

Mobile, too, is distinguishable. In reaching its conclusion that the Natural Gas Act did not authorize the unilateral supersession of contracts by tariffs, the Supreme Court emphasized the fact that the Natural Gas Act empowers the FPC to *regulate* privately-negotiated contracts.[45] The

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[44] We note that the history of business relations between A T & T and Western Union indicate that the two companies have, since 1928, assumed that it is proper to govern their "exchange of facilities" by contract.

[45] Section 5(a) of the Natural Gas Act provides:

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance

Court justified the Natural Gas Act's reliance upon individualized contracts in terms of this power, stating that "the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public." 350 U.S. at 339. Similarly, the Court noted.

> Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. . . . On the other hand, denying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other hand.

350 U.S. at 344. A similar justification is not available under the Communications Act. Unlike the Natural Gas Act, there is no provision in the Communications Act *expressly* authorizing the Commission to regulate (i.e. supervise in the public interest) privately negotiated contracts.

In Docket 19896, after conceding that the Act does not expressly grant the Commission contract-regulating pow-

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with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

15 U.S.C. § 717(d)(a).

ers, the FCC concluded that implicit in several sections of the Act is the recognition of such a power. Petitioner strongly contests this point, arguing that if the Commission were so empowered, the FCC would not have attempted (as it did in 1964) to persuade Congress to vest authority in it to regulate intercarrier contracts. *See* Hearings on H.R. 10270 before the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 88th Cong., 2d Sess. at 9-10, 24, 39 (1964); *but cf. United States v. Southwestern Cable Co.*, 392 U.S. 157, 169-70 (1968). We find it unnecessary to resolve this controversy.

Although *Mobile* is distinguishable, the Supreme Court's analysis therein nevertheless causes us to reject A T & T's argument, even if we assume that the Commission lacks regulatory power over intercarrier contracts. The *Mobile* Court reached its conclusion by the following deductive path:

> a) the Natural Gas Act permits parties to order their business relations by contract (i.e. the contract at issue was lawful);[46]
>
> b) since the *contract* at issue does not authorize its own unilateral modification, supersession of the contract by a unilaterally imposed tariff can only occur if the *Natural Gas Act* grants such a power;[47] and
>
> c) the provisions of the Natural Gas Act do not grant gas companies the power to unilaterally modify con tracts.[48]

We have already determined that the Communications Act permits Western Union and A T & T to arrange leases by

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[46] 350 U.S. at 338.

[47] The Court states:

> Absent the Act, a unilateral announcement of a change to a contract would of course be a nullity....

350 U.S. at 339.

[48] 350 U.S. at 339-44.

contract. There being no suggestion that the A T & T—Western Union contracts authorize unilateral modification, the sole question remaining for this Court, according to the *Mobile* analysis, is whether the Communications Act supplies this authorization.

We have recognized that "a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment." *Bauers* v. *Heisel*, 361 F.2d 581, 587 (3d Cir. 1966) (en banc), *cert. denied*, 386 U.S. 1021 (1967); *see also Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907) (". . . a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.") The Communications Act contains no express statement of an intention to authorize unilateral modification or abrogation of privately negotiated contracts. Nor do the various provisions of the Act "imperatively require" that we imply such authorization. The two sections of the statute coming closest to authorizing a unilateral change—sections 203(b) [49] and 204 [50]—are insufficient, even in their combined

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[49] 47 U.S.C. § 203(b) provides:

> No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

[50] 47 U.S.C. § 204 provides:

> Whenever there is filed with the Commission any new charge, classification, regulation, or practice, the Commission may

effect, to convince us that the FCC has the power to authorize the unilateral changes attempted by A T & T. Section 203(b), prohibiting tariff modifications unless ample notice is given to the Commission, *takes away* power from communications carriers. As a negative pronouncement, § 203(b) in no sense dictates circumstances in which a tariff could be used to abrogate a prior contract. In *Mobile*, the Supreme Court explained that a parallel provision of the Natural Gas Act [51] similarly did not constitute an affirmative grant of power. The Court stated:

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either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

[51] Section 4(d) of the Natural Gas Act provides:

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract

> It is argued that [Section 4(d)] authorizes a natural gas company to change its rates contracts simply by filing a new schedule of rates, to go into effect in no less than thirty days. On its face, however, § 4(d) is simply a prohibition, not a grant of power. It does not purport to say what is effective to change a contract. . . . The section says only that a change *cannot* be made without the proper notice to the Commission; it does not say under what circumstances a change *can* be made. . . . In short, § 4(d) on its face indicates no more than that otherwise valid changes cannot be put into effect without giving the required notice to the Commission. To find in that section a further purpose to empower natural gas companies to change their contracts unilaterally requires reading into it language that is neither there nor reasonably to be implied.

350 U.S. at 339-40. Section 204, establishing the procedure for FCC review of newly filed tariffs (and including an authorization for temporary suspensions of tariffs), similarly is silent about the utilization of tariffs to modify existing contracts. We find neither in this section nor in any other provision of the Act an indication that Congress intended to allow carriers to abrogate intercarrier contracts by means of subsequently filed tariffs.

The cases cited by petitioner do not detract from our conclusion that the Communications Act lacks an authori-

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relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

15 U.S.C. § 717(c)(d).

zation of unilateral contract modification. *Cruces Cable Co.*, 35 F.C.C.2d 707 (1972), *reconsideration denied*, 39 F.C.C. 2d 552 (1973) is distinguishable. Although in *Cruces* the Commission did indicate that a communications carrier may unilaterally abrogate a contract by filing a tariff, the contract in *Cruces* was wholly unlike the contracts involved herein. In *Cruces*, the contract contained no specific rate, but rather provided that the tariffs "shall be a part of this Agreement as fully as though set forth specifically herein." 35 F.C.C.2d at 708. The subsequently filed tariff was not (as here) inconsistent with the contract, but rather was expressly contemplated by the parties in their agreement, and supplied the missing contract rate. The use of a tariff as an integral part of a contract may not be compared with the use of a tariff to abrogate a contract. *Cf. United Gas Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958); *Richmond Power & Light Co.* v. *F.P.C.*, 481 F.2d 490, 492-93 (D.C. Cir. 1973), *cert. denied, sub nom. Indiana & Michigan Electric Co.* v. *Anderson Power & Light*, 414 U.S. 1068 (1974). *Cincinnati, New Orleans & Texas Pacific Railway Co.* v. *Chesapeake and Ohio Railway Co.*, 441 F.2d 483 (4th Cir. 1971), is also distinguishable. At issue in *Cincinnati* was the right of a railroad to recover charges under a tariff that had already become effective. The Court's conclusion that the charges were recoverable (despite the fact that the tariff abrogated a contract) was based on the well-established principle that a "tariff, so long as it is in effect, must be treated as though it has the force of law." 441 F.2d at 488. In the instant case, A T & T's tariff has not yet been put into effect (the Commission having rejected it) and thus cannot claim the support of the principle articulated in *Cincinnati*. Finally, we regard petitioner's reliance upon *A T & T* v. *F.C.C.*, 487 F.2d 865 (2d Cir. 1973) to be unpersuasive.[52] It was A T & T, and not the

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[52] Section 205(a) of the Communications Act provides, in part, that:

Whenever, after full opportunity for hearing, upon a com-

FCC, that set the current A T & T—Western Union contract rate. Thus, if any party "froze" the rate, it was A T & T, and not the Commission.

Accordingly, we agree with the Commission's conclusion that the Communications Act does not authorize the modification or abrogation of contracts by subsequently filed tariffs. It follows from this conclusion that the FCC acted properly in rejecting the A T & T tariff (to the extent that the tariff conflicted with the A T & T—Western Union contracts), the Commission having the power to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). *See United Gas Co.* v. *Mobile Gas Corp., supra,* 350 U.S. at 347 (construing a similar provision of the Nat-

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plaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

In A T & T v. F.C.C., *supra,* the Second Circuit analogized an order compelling A T & T to continue charging prior tariff rates to a "prescription" order. 487 F.2d at 875 ("Under the circumstances of this case, we see no difference between a 'prescription' of new rates and a 'freeze' of old rates."). Since a prescription order cannot be issued without the FCC first conducting a hearing (*see* § 205(a), *supra*), the Court struck down a "freeze" order for failure to conduct a § 205(a) hearing.

ural Gas Act); *cf. Associated Press* v. *FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971) (dictum).[53]

We conclude that the FCC's FX and CCSA orders (¶ 53 and ¶ 54) and the Commission's partial rejection of the A T & T tariff (¶ 55) are proper. The Commission's decision and order in Docket 19896, 46 F.C.C.2d 413, will be affirmed.

APPENDIX

53. ACCORDINGLY, IT IS ORDERED, that American Telephone and Telegraph Company and the Bell System companies enumerated in paragraph 18 of our Memorandum Opinion and Order to Show Cause, 44 FCC2d 245 at 251,[54] comply with the following not later than ten days after the release of this Decision:

(a) Furnish to MCI Telecommunications Corporation, MCI New York West, Inc. and other specialized common carriers the interconnection facilities essential

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[53] In light of the above conclusion, we find it unnecessary to discuss alternate contentions offered by the FCC in support of its partial rejection of the A T & T tariffs.

[54] The companies enumerated are: Bell Telephone Company of Pennsylvania, C&P Telephone Company of Washington, D.C., The C&P Telephone Company of Maryland, The C&P Telephone Company of Virginia, The C&P Telephone Company of West Virginia, Cincinnati Bell, Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, Mountain States Telephone and Telegraph Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, Northwestern Bell Telephone Company, The Ohio Bell Telephone Company, Pacific Northwest Bell Telephone Company, The Pacific Telephone and Telegraph Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, The Southern New England Telephone Company, Southwestern Bell Telephone Company, and Wisconsin Telephone Company.

to the rendition of all of their presently or hereafter authorized interstate and foreign communications services and to enable the said specialized common carriers to terminate their authorized interstate and foreign communications services, including interconnection by the specialized carriers into a telephone company's local exchange facilities for the purpose of furnishing Foreign Exchange (FX) service or for insertion into telephone company Common Control Switching Arrangements (CCSA);

(b) Furnish the interconnection facilities specified in subparagraph (a) above on reasonable terms and conditions; and file with the Commission pursuant to Section 203 of the Act and Part 61 of the Commission's Rules, tariff schedules to cover interconnection facilities for all of the authorized interstate and foreign communications services of the specialized common carriers;

(c) The specialized common carriers shall be charged for the interconnection facilities and services furnished by American Telephone and Telegraph Company and the Bell System companies, in connection with the transmission by the specialized carriers of authorized interstate and foreign communications and the provision of authorized interstate and foreign communications services, solely and exclusively pursuant to the charges, terms, and conditions specified in tariffs filed with the Commission; and

(d) Furnish to the specialized carriers for their authorized interstate and foreign communications services, interconnection facilities similar to those presently provided to Bell's Long Lines Department on a nondiscriminatory basis.

54. It Is Further Ordered, pursuant to the authority contained in the provisions of Sections 4(i) and 205(a)

of the Communications Act, that American Telephone and Telegraph Company and the Bell System companies shall not later than ten days after the release of this Decision CEASE AND DESIST from:

(a) Engaging in any conduct which results in a denial of, or unreasonable delay in establishing, physical connections with MCI and other specialized common carriers for their presently or hereafter authorized interstate and foreign communications services;

(b) Implementing any policy or practice which forecloses the establishment of through routes, and charges, facilities and regulations applicable thereto, in connection with MCI's and other specialized common carrier parties' presently or hereafter authorized interstate and foreign communications services;

(c) Implementing any policy or practice which results in denying to MCI or any other carrier party reasonable interconnection services similar to those provided to the Long Lines Department of the American Telephone and Telegraph Company in connection with the authorized interstate and foreign communications services of such other carriers; and

(d) Charging MCI or the other specialized common carrier parties for interconnection facilities furnished in connection with the authorized interstate and foreign communications services of the said specialized carriers pursuant to tariffs filed with state regulatory commissions or delaying or refusing to furnish requested interconnection facilities for such purposes pending approval by state regulatory commissions of the furnishing of the aforementioned facilities.

55. IT IS FURTHER ORDERED that:

(a) Insofar as the tariffs filed by Bell include interconnection facilities and services covered by the Bell-

Western Union exchange of facilities contracts and used by Western Union in connection with the provisions of its authorized interstate services, they ARE REJECTED; and

(b) With respect to any services and facilities not covered by the abovementioned contracts but which are furnished by the Bell System companies for the use of Western Union in connection with the provision of its authorized interstate communications services, the telephone companies shall furnish the said interconnection facilities on reasonable terms and conditions; and charge Western Union for the provision of such interconnection facilities solely and exclusively pursuant to tariffs filed with this Commission pursuant to Section 203 of the Communications Act and Part 61 of the Rules.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

APPENDIX B

FCC 74-457—11098

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET No. 19896

In the Matters of
BELL SYSTEM TARIFF OFFERINGS of Local Distribution Facilities for Use by Other Common Carriers; and

Letter of Chief, Common Carrier Bureau, dated October 19, 1973, to Laurence E. Harris, Vice President, MCI Telecommunications Corporation

Appearances

J. Hugh Roff, Jr., John W. Gray, Jr., H. A. Davenport, William L. Leonard, Alfred A. Green and *John P. Fons* on behalf of Bell Systems Companies; *Richard R. Hough,* Vice President AT&T and President of its Long Lines Department also appeared; *Warren E. Baker, Richard J. Croker* and *Carolyn C. Hill* on behalf of The United Telephone System; *George E. Shertzen, William R. Malone, Vincent Gallogly* and *Ruth L. Prokop* on behalf of GTE Service Corporation; *Thomas J. O'Reilly* (Chadbourne, Park, Whiteside & Wolff) on behalf of United States Independent Telephone Association; *Wm. Warfield Ross, William R. Weissman, C. Coleman Bird* (Wald, Harkrader & Ross), *Jack Werner* and *Richard C. Hostetler* on behalf of The Western Union Telegraph Company; *Ernest Brod* and *Howard L. Stevens* on behalf of Western Union International, Inc.; *Michael H. Bader, Kenneth A. Cox, William J. Byrnes* and *John V. Kenny* (Haley, Bader & Potts) on behalf of MCI Telecommunications Corporation and MCI New York West, Inc.; *Laurence E. Harris,* Vice President

MCI Telecommunications Corporation also appeared; *W. Theodore Pierson, Sr., W. Theodore Pierson, Jr.* and *Mark J. Tauber* (Pierson, Ball & Dowd) on behalf of CML Satellite Corporation; *Francis J. DeRosa* and *Carl J. Cangelosi* on behalf of RCA Global Communications, Inc.; *Michael L. Glaser, Robert M. Silverman* (Glaser & Fletcher), *John M. Scorce* and *Kevin H. Cassidy* on behalf of Data Transmission Company; *Charles H. Helein* and *Arthur R. Perkins* (Dow, Lohnes & Albertson) on behalf of N-Triple-C Inc.; *Thormund A. Miller, Richard S. Kopf* and *Herbert E. Forrest* (Steptoe & Johnson) on behalf of Southern Pacific Communications Company; *Richard H. Strodel* (Wheeler & Wheeler) on behalf of Western Tele-Communications, Inc.; *David A. Irwin* and *John D. Jackson* on behalf of American Satellite Corporation; *Joseph J. Jacobs* and *Howard A. White* on behalf of ITT World Communications, Inc.; *Jay E. Ricks* and *Robert R. Bruce* (Hogan & Hartson) on behalf of Midwestern Relay Company and CPI Microwave, Inc.; *Kelley Griffith, James O. Juntilla, Ruth V. Reel* and *Adrian R. Auger* on behalf of the Common Carrier Bureau.

Decision

Adopted: April 23, 1974 Released: April 23, 1974

By the Commission: Commissioner Reid concurring and dissenting to paragraph 31 and issuing a statement; Commissioner Hooks concurring in the result.

I. *Background*

1. This proceeding was initiated and designated for oral argument by our Memorandum Opinion and Order to Show Cause, FCC 73-1299, 44 FCC 2d 245, released December 13, 1973, and the background facts are therein set forth in detail. Briefly, this case presents for Commission determination the very serious controversy between the Bell

System telephone companies[1] and other telephone companies on the one hand and non-Bell, non-telephone communications common carriers (herein referred to as the specialized common carriers) on the other hand concerning the extent to which the latter or their customers should be permitted to interconnect their facilities with those of the telephone companies. In answer to an inquiry from MCI Telecommunications Corporation (MCI), a specialized common carrier, the Chief of our Common Carrier Bureau advised in a letter dated October 19, 1973 that MCI was entitled to secure from telephone companies various types of interconnection, and Bell applied for Commission review of the Bureau Chief's action. Another issue involved herein relates to the provision of facilities by the Bell System to Western Union Telegraph Company. For many years, Bell has provided local distribution facilities to Western Union pursuant to exchange of facilities contracts. Bell now proposes to provide and charge for such facilities pursuant to tariffs filed with state commissions rather than in accordance with the terms of the contracts and Western Union complains that such action is unlawful. Finally, there is presented herein the question of whether Bell has complied with the conditions concerning interconnection facilities attached to the domestic satellite authorizations by our order in *A.T.&T.*, 42 FCC 2d 654, 660, released September 12, 1973.

2. As modified by our Memorandum Opinion and Order, FCC 74-79, 44 FCC 2d 914, released January 25, 1974, our order designating this proceeding for oral argument:

> (a) Directed the Bell System companies to show cause why they should not be ordered to cease and desist from:

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[1] The Bell System companies involved in this proceeding are enumerated in paragraph 18 of our designation order. Hereinafter American Telephone and Telegraph Company and the Bell System companies will be referred to jointly as Bell or the Bell System companies.

(1) altering in any way, the provisions of exchange of facilities contracts with Western Union, except in strict accordance with the terms of such contracts;

(2) engaging in any conduct which results in a denial of, or unreasonable delay in establishing, physical connections with MCI and the other carrier parties for their authorized or pending interstate services;

(3) implementing any policy or practice which forecloses the establishment of through routes, and charges, facilities and regulations applicable thereto, in connection with MCI's and the other carrier parties' authorized or pending interstate services;

(4) filing with state commissions tariff schedules of charges and regulations for services and facilities used for communications originating in one state and terminating in another state, or communications between a state and a point outside the United States; and

(5) implementing any policy or practice which results in denying MCI or any other carrier party interconnection privileges similar to those presently provided to AT&T's Long Lines Department in connection with their authorized or pending interstate services.

(b) Directed Bell to show cause:

(1) why filing Bell tariffs for domestic satellite interconnection facilities with state commissions, rather than exclusively with this Commission, should not be considered as non-compliance with a condition in its domestic satellite authorizations that such filings be made pursuant to Section 203 of the Act and Part 61 of our Rules; and,

(2) if such filings with the states are found to be non-compliance with said condition, why AT&T's domestic satellite authorizations should not be revoked or modified.

(c) Directed all parties to this proceeding to address themselves at this oral argument to the following questions:

(1) whether the Commission has heretofore ordered the telephone companies, pursuant to Section 201(a) of the Communications Act, to provide interconnection with MCI or whether such interconnection is otherwise required pursuant to rule or regulation within the meaning of Section 312 of the Act;

(2) if so, (a) the scope of that order or rule or regulation with particular reference to interconnection for FX and CCSA services of MCI; (b) whether the telephone companies have complied with such order, rule or regulation and, (c) if they have not complied, the appropriate remedy, whether under Section 312 of the Act or otherwise;

(3) if interconnection has not hitherto been ordered or required by rule or regulation whether it should be and, if so, upon what terms and conditions; and

(4) whether the Commission should affirm, reverse or modify the staff action of October 19, 1973 for which review is here requested.

3. In our designation order, American Telephone and Telegraph Company and the Bell System operating companies were named as respondents; and MCI Telecommunications Corporation and MCI New York West, Inc. (referred to herein jointly as MCI), Western Union Tele-

graph Company, and the Chief of the Commission's Common Carrier Bureau were made parties to the proceeding. In addition, the following requested and were granted permission to participate as parties (Memorandum Opinion and Order, FCC 74-44, released January 22, 1974): United Telephone System, United States Independent Telephone Association, GTE Service Corporation, Data Transmission Company, Western Tele-Communications, Inc., N-Triple-C Inc., Southern Pacific Communications Company, Midwestern Relay Company, CPI Microwave, Inc., ITT World Communications, Inc., RCA Global Communications, Inc., Western Union International, Inc., American Satellite Corporation, CML Satellite Corporation, and the New York State Public Service Commission. By letter dated February 14, 1974, the New York State Public Service Commission advised that it was withdrawing from the case. RCA Global Communications, Inc. filed a brief on January 21, 1974 but informed the Commission on February 25, 1974 that it would not appear for oral argument. The briefs filed by the parties to this proceeding are listed in the Appendix to this Decision. On March 4, 1974, the Commission heard oral argument.

II. *Jurisdiction*

4. As indicated in our designation order, Bell has filed tariffs with state regulatory commissions which relate to the furnishing of local distribution facilities to other common carriers and has taken other action with respect to the provision of interconnection facilities which require our immediate attention. Although tariffs respecting such interconnection were also filed with this Commission, the filings were made under protest. Bell contends that the interconnection facilities are entirely intrastate, that the offerings are strictly of a local nature, and that, consequently, the activities involved in this proceeding are local and subject to state and local regulation exclusively. Consequently, it argues, this Commission has no jurisdiction

over the matter of interconnection of the specialized carriers or their customers which these local distribution facilities or the tariffs under which they are furnished. A discussion of the nature of the communications transmitted and the interconnection services requested by the specialized common carriers is essential to the resolution of the jurisdictional question raised by Bell.

5. The specialized common carrier parties provide private line services to their subscribers and are engaged in the transmission of communications, voice, data, or both, between a point in one state and a point in another state and/or a foreign country, i.e., interstate or foreign communications. Whether one or more of such carriers may upon occasion carry intrastate communications or propose to do so in the future is irrelevant to the jurisdictional question since we are concerned here solely with interconnection for interstate and foreign communications. Although some of the specialized carriers have indicated an intention to construct local distribution facilities, it appears that at this time all such carriers are dependent upon the local distribution facilities of the telephone company serving the area to be reached in order to provide end-to-end service to their customers. Thus the interconnection which the specialized carriers seek is an integral part of the interstate or foreign communications which they transmit and the local distribution facilities of the telephone company are an essential link in the interstate and foreign communications services provided by the specialized carriers.

6. The contentions of Bell and the other telephone company parties in support of their position on the jurisdictional question have been considered but we find them to be without merit. Like arguments were advanced and rejected in *Telerent Leasing Corporation, et al.*, FCC 74-109, released February 5, 1974,[2] where the Commission had

[2] A petition for review of the Commission's decision has been

under consideration its jurisdiction with respect to the interconnection of customer-provided communications equipment to the nationwide switched public telephone network. Therein we held, on the basis of an exhaustive study and analysis of the pertinent legislative history and judicial and administrative precedents, that the Commission has primacy in authority over the terms and conditions governing such interconnection and that no state regulation can preempt the Commission's jurisdiction over interstate communications and the regulation of the terms and conditions governing such communications. For the reasons therein stated we must reject the telephone companies' challenge to our jurisdiction here. See also *The United States Department of Defense, et al.*, 38 FCC 2d 803 (Review Board, 1973), affirmed FCC 73-854, where we asserted exclusive jurisdiction over Dial Restoration Panel (DRP) equipment which is part of a nationwide defense communications system even though the facilities were used in part for the transmission of intrastate communications.[3] We believe that these decisions are controlling here; and we therefore conclude that the terms, conditions, and charges for the interconnection of the private line interstate and foreign communications of the specialized common carriers with the local distribution facilities of Bell or the particular telephone company serving the area for the purpose of enabling the specialized carriers to provide, and their customers to obtain, all essential services for interstate or foreign communications are within the exclusive jurisdiction of the Commission. We further conclude that the offerings of the local telephone company with respect to such interconnection must be covered by a tariff or tariffs filed with the Commission pursuant to

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filed in the United States Court of Appeals for the Fourth Circuit (Case No. 74-1220).

[3] This decision has been appealed to the United States Court of Appeals for the District of Columbia Circuit by St. Joseph Telephone and Telegraph Company (Case No. 73-1907).

Section 203 of the Act and Part 61 of our Rules; and that the charges, terms, and conditions for such interconnection must be pursuant to the tariffs filed with this Commission and not pursuant to the charges, terms, and conditions specified in a tariff filed with a state regulatory body.

III. *Interconnection for the Specialized Common Carriers*

7. Bell further argues that even if the Commission has jurisdiction over the subject matter of interconnection of the private line services of the specialized carriers with the local distribution facilities of the telephone companies, no enforcement order requiring such interconnection is available in this proceeding since the telephone companies have not been accorded a hearing pursuant to Section 201(a) of the Act[4] to determine whether interconnection is in the public interest, and these companies have never been ordered by the Commission to provide the interconnection presently under consideration. Assuming that a hearing has been held an an order issued as to some types of interconnection, Bell further asserts that such hearings and orders did not encompass the provision of facilities for connection into the telephone companies' local exchange facilities for the purpose of furnishing foreign exchange (FX) service or for insertion into telephone company common control switching arrangements (CCSA).[5] Each

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[4] Section 201(a) provides as follows:

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

[5] FX and CCSA are terms used by Bell in its tariffs. Certain of the specialized carriers offer comparable services but use other

of these contentions will be considered below as well as the question of whether an order should now issue.

8. In considering Bell's contention that it has not been accorded the "opportunity for hearing" specified in Section 201(a) of the Act to support an interconnection order, we must emphasize that in the determination of policies, procedures and other questions common to a large number of applications, the Commission is not restricted to adjudicatory hearings but may proceed by way of rule making. *California Citizens Band Association, Inc.* v. *United States and Federal Communications Commission,* 375 F. 2d 43, 54 (9th Cir. 1967), *cert, denied* 389 U. S. 844. See also *WBEN, Inc.* v. *United States and Federal Communications Commission,* 396 F. 2d 601, 618 (2d Cir. 1968), *cert. denied*

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terms. For the purpose of convenience, however, the terms FX and CCSA will be used in this Decision when referring to these service offerings by any of the carriers. These terms may be defined as follows:

> Foreign exchange (FX) is a private line service that is partially "switched". It allows a businessman located in one state to, in effect, maintain a local phone in another state. Under FX, for example, a businessman in Washington can be reached by telephone subscribers in New York City and can himself reach New York City telephone subscribers (through a local loop in Washington, a Washington-New York interexchange line, and a business line in the New York City exchange area). However, New York City telephone subscribers could not reach Washington subscribers other than the Washington businessman over FX private line service and the latter would have to maintain a separate telephone in order to tie into the Washington exchange area.
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> A Common Control Switching Arrangement (CCSA) is a private line system for linking the various offices of a large company through large switches on a local telephone company's premises instead of through PBX switches on the customer's premises.

The private line circuits furnished in CCSA are provided for the exclusive use of the CCSA customer. However, the switching machines are shared with other private line service customers.

393. U.S. 914.[6] Section 4(j) of the Act expressly authorizes the Commission to conduct its proceedings "in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Where, as here; there is no statutory requirement that the Commission determination be made on the basis of an evidentiary record, "the choice made between proceeding by general rule or by individual *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947). See also *United States* v. *Allegheny-Ludlum Steel Corporation*, 406 U.S. 742, 756-757 (1972); *Transcontinent Television Corporation* v. *Federal Communications Commission*, 308 F. 2d 339, 342-343, 113 U.S. App. D.C. 384, 387-388 (1962). A review of all of the proceedings involving the question of interconnection by the specialized carriers with the facilities of Bell demonstrates that Bell has been accorded ample "opportunity for hearing" to meet the requirements of Section 201(a) of the Act.

9. In the original *MCI* case,[7] which was an adjudicatory proceeding involving applications for authorizations to construct facilities to provide a common carrier private line microwave radio service between Chicago, Illinois and St. Louis, Missouri, the applicant stated its intention and desire to utilize the facilities of Bell in order to link its facilities to the premises of its subscribers, such links being referred to therein as loop service. However, at the hearing

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[6] For a further discussion of the type of hearing which satisfies the hearing requirements of various provisions of the Communications Act, see *Specialized Common Carriers Services*, 29 FCC 2d 870, 896-900 (1970).

[7] *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), reconsideration denied, 21 FCC 2d 190 (1970). Microwave Communications, Inc., like MCI Telecommunications Corporation and MCI New York West, Inc., is a subsidiary of MCI Communications Corporation.

Bell [8] objected to this provision of loop service, contending that the resultant division of responsibility and difficulty in conducting tests when trouble occurs would make interconnection inadvisable, and that technical problems would be created such as the possibility of high signal levels being introduced into their system by MCI's operations or those of its customers which would damage the telephone company's transmission facilities. Countervailing evidence was introduced on behalf of MCI.

10. The Commission concluded that the public interest would be served by a grant of the authorizations requested by the applicant. With respect to the established carriers' contention that loop service was not technically feasible, the Commission held that the evidence was not sufficient to support a conclusion that this was so. No specific affirmative order of interconnection was issued since the facts and details of the requirements of MCI's customers were not then known. However, since the carriers had indicated that they would not voluntarily provide loop service, the Commission retained jurisdicton to enable MCI to obtain a prompt determination on the matter of interconnection, and the Commission concluded that "absent a significant showing that interconnection is not technically feasible, the issuance of an order requiring the existing carriers to provide loop service is in the public interest" (18 FCC 2d at 965, par. 36).

11. In its petition for reconsideration of the *MCI* Decision, Bell reconsidered its position that loop service was not technically feasible. Therein it stated that the Bell System companies "have connecting arrangements with other common carriers and have a tariff offering of links for connection to customer-provided facilities. There would appear to be no reason for a different policy here." In this

[8] The American Telephone and Telegraph Company and certain of its operating telephone companies, as well as other established carriers, were parties to the proceeding.

Docket No. 19896 proceedings, Bell likewise concedes that loop service poses no significant technical problems and that it is providing such service. However, in the *MCI* case, other carriers included in their petitions for reconsideration the argument that they had been denied a hearing pursuant to Section 201(a) on the matter of interconnection. The Commission rejected this argument as being without merit. After reiterating its findings that a grant of the MCI application would serve the public interest and its view that the issuance of an order requiring the provision of loop service with respect to a particular application "when the facts and details of a customer's needs are known," would likewise be in the public interest unless a significant showing of technical infeasibility was made, the Commission stated (21 FCC 2d at 193, par. 8):

> While the carriers refer vaguely to other considerations which might require a hearing, none is specified. Consequently, on the basis of the pleadings before us, we find no substance to the carriers' complaint that they are being deprived of a hearing as to any significant matters.

12. Thus Bell and the other existing carriers which were parties to the *MCI* proceedings were accorded an "opportunity for hearing" on interconnection for loop service even though no order of interconnection was issued in that proceeding.[9] However, in the *Specialized Common Carrier Services* rulemaking proceeding in Docket No. 18920, not only were the telephone companies and other common carriers afforded a further "opportunity for hearing" but a broad directive was issued to the telephone

[9] We do not hold that the Decision in the MCI proceeding specifically dealt with the question of interconnection with respect to FX and CCSA services. But the broad issue of interconnection was considered and the Commission in that proceeding first articulated its policy of requiring the established carriers to furnish facilities to the specialized carriers for interconnection.

companies to provide interconnection facilities for the specialized carriers. The Commission undertook in Docket No. 18920 to establish basic policies and procedures for the disposition of numerous applications then pending before it and of the additional applications which were expected to be filed to provide specialized common carrier services in the Domestic Public Point-to-Point Microwave Radio Service. Expressly citing Section 201 of the Act as one of the statutory bases for the institution of the proceeding, the Commission in its *Notice of Inquiry To Formulate Policy, Notice of Proposed Rule Making, and Order*[10] posed a number of questions to which it requested that all interested parties direct their comments. Two are of particular relevance here and they are follows:

> A. Whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field; and if so,
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> E. What is the appropriate means for local distribution of the proposed services?

13. In regard to Question E, the Commission stated that the means for local distribution of the proposed services was a matter of concern, that the "local exchange facilities of the Bell System and independent telephone companies presently constitute almost the sole means for local distribution of interstate common carrier services . . ."; that upon application by the new carriers for access to local distribution of communications, the local carrier would be expected to permit "interconnection or channel arrangements on reasonable terms and conditions"; that the customers of the new carriers likewise should be afforded the option by the local carrier to obtain local distribution facilities under reasonable terms; and that, par-

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[10] *Specialized Common Carrier Services*, 24 FCC 2d 318, 327, 349 (1970).

ticularly where a carrier has monopoly control over "essential facilities", the Commission would condone no policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors (24 FCC 2d at 347). The Commission also expressed interest in "the desirability of using the existing local exchange facilities for local distribution of some of the proposed services" of the specialized carriers (24 FCC 2d at 347, par. 68). Pointing out that none of the applicants had applied for local distribution facilities or submitted concrete proposals as to interconnection or the leasing of facilities, the Commission stated (24 FCC 2d at 349):

> Applicants and other interested persons are requested to address this aspect fully in their comments, with particular attention to the technical feasibility and comparative costs of the various alternatives and the effect on charges to subscribers for end-to-end service.

From the above, as well as from a reading of the entire Notice, it is apparent that, although the Commission made reference to loop service, as Bell asserts, it was never intended to limit the scope of the inquiry to loop service. Rather, a broader inquiry into the local distribution of the interstate private line common carrier services proposed by the new carriers was contemplated.

14. Thus, when Bell filed its comments in Docket No. 18920, it was on notice that the proceeding was being conducted in reliance, at least in part, on Section 201 of the Act and that the determination of policies with respect to local distribution facilities was one of the principal matters under consideration and Bell directed some of its remarks to this issue. In its comments Bell argued that the "proposals of the specialized common carriers with respect to local distribution are vague and inadequate" and that it would be in a better position to comment on the subject after it received the specialized carriers' comments as to

the appropriate means for achieving local distribution of the proposed services. Nevertheless, Bell acknowledged that there might be situations where it would not be practicable for the specialized carriers to provide their own local distribution and it stated that when the Commission determines that the licensing of additional carriers is in the public interest, "we would be willing to discuss with them the technical arrangements required and the appropriate charges for any connections required of the telephone companies" (page 119 of the comments filed on October 1, 1970). In its reply comments filed on December 2, 1970, Bell asserted that the specialized carriers had submitted little additional information concerning their proposals for local distribution apparently because most of them desired to maintain maximum flexibility by having the "freedom to choose between a telephone company's local distribution plant, their own local distribution, or any other available scheme such as CATV" (page 60). However, Bell again stated that if the Commission licensed additional intercity carriers, it was "prepared to work cooperatively with them for such connections as may be required". (page 61).

15. After reviewing the extensive comments filed by Bell and the numerous other parties to the Docket No. 18920 proceeding and after hearing oral argument,[11] the Commission enunciated in its *First Report and Order* released June 3, 1971, the policy determinations and conclusions which had been reached. Of particular significance here are the Commission's conclusions with respect to Questions A and E set forth above. As to question A (whether the entry of new specialized carriers is in the public interest), the Commission stated (29 FCC at 920, par. 103):

> We find that: there is a public need and demand for the proposed facilities and services and for new and

[11] Oral argument was heard by the Commission on January 21 and 22, 1971.

diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry. We further find and conclude that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.

16. As for question E (local distribution), the Commission found and concluded as follows (29 FCC 2d at 940, par. 157): [12]

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[12] An analogous situation where questions of what competition should be allowed and the scope of the interconnection which should be required were presented is the *Domestic Satellite (Domstat)* proceeding, Docket No. 16495. That proceeding was initiated under authority, *inter alia*, of Section 201 of the Act; and Bell, as well as other parties, filed comments therein. In the *Second Report and Order*, 35 FCC 2d 844, released June 16, 1972, the Commission established a policy favoring multiple entry and competition both among satellite system licensees and between satellite and terrestrial systems; and it directed the existing terrestrial carriers, including Bell, seeking domestic satellite authorizations to submit descriptions of the interconnection arrangements they will make available to other satellite systems or earth station licensees as a prerequisite to action on their own domestic sateliite applications. The Commission asserted that this objective was to insure that all satellite carriers would have access on non-discriminatory terms and conditions to local loop and interexchange facilities required for the purpose of either originating or terminating services for their customers. 35 FCC 2d at 856. In disposing of petitions which were filed for reconsideration of the decision, the Commission stated that, absent a showing by existing carriers that interconnection will be offered in a timely, reasonable, and non-discriminatory manner, it would withhold any grant of a requested satellite authorization to an existing carrier. 38 FCC 2d 665 at 698-699. Thereafter, Bell applied for satellite facilities. The Commission found that Bell's

We reaffirm the view expressed in the *Notice* (paragraph 67) that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier. Moreover, as there stated, "where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors." In view of the representations of AT&T and GT&E in this proceeding, upon which we rely, and the self-interest of other independent telephone companies in not losing potential new business, there appears to be no need to say more on this question at this time. Should any future problem arise, we will act expeditiously to take such measures as are necessary and appropriate in the public interest to implement and enforce the policies and objectives of this Decision.[13]

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proposals for interconnection were too restrictive and it conditioned the grant of Bell's authorizations on, *inter alia*, its making available to satellite carrier licensees the necessary terrestrial facilities under lease terms and conditions that will facilitate end-to-end service by those carriers. The Commission further held that interconnection should be governed by tariffs which would "provide timely and effective access arrangements to other satellite carriers on reasonable and non-discriminatory conditions." *AT&T*, 42 FCC 2d 654.

[13] The Commission also concluded that the specialized carriers should have the option of constructing their own independent local facilities in order to provide end-to-end service. However, since the use of radio was contemplated for this purpose and insufficient evidence was contained in the record to make possible a determination of what radio frequencies should be made available, a new rule making proceeding was instituted to explore this question. See *Specialized Common Carrier Services*, 30 FCC 2d 280 (1971).

17. We believe that the proceedings held to date, including the ones reviewed above (*MCI* and the *Specialized Common Carrier Services* proceedings) and the present one, provide an adequate base for the issuance of an interconnection order under Section 201(a). That section does not specify a hearing on the record, and thus does not in terms require an adjudicatory hearing. *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224 (1973). Furthermore, we have not found the existence of material factual disputes which would require an adjudicatory procedure. Thus, we conclude that the claim of a right to such a proceeding is unfounded. Also, in view of the Commission decision in *MCI* and the policy determinations and conclusions set forth in the *Specialized Common Carrier Services* proceeding, we find that our previous orders were broad enough to require the telephone companies to provide interconnection facilities for MCI and other specialized carriers on a non-discriminatory basis for all services provided to an affiliated or other carrier in competition with the authorized services of the new specialized carriers absent a significant showing that such interconnection is not technically feasible. The matter of interconnection again came to the Commission's attention when MCI Telecommunication Corporation and MCI New York West, Inc. complained in a letter dated August 27, 1973, that the local telephone companies were refusing to interconnect for the provision of MCI's interstate service, that AT&T was arbitrary in its decisions as to what type of service the local telephone companies would supply "when they are providing a full range of services to the Long Lines Department and Western Union in direct competition to MCI," and that the telephone companes were wrongfully asserting a need for intrastate regulatory approval. A copy of this letter was sent to Bell by our Common Carrier Bureau with a request for a prompt reply.

18. Although denying any wrongdoing, Bell agreed that negotiations with other carriers for the least of local dis-

tribution facilities were pending but that no agreement had been reached, and that tariffs covering such distribution facilities were being filed with state commissioners. Bell further stated its view that the "arrangements described herein will achieve the Commission's objective stated in the *Specialized Common Carrier* case that the specialized carriers be afforded interconnection facility arrangements on reasonable terms and conditions." No claim was advanced of possible damage to Bell's facilities or that a further hearing or further orders pursuant to Section 201(a) were required. Concerning the charge that AT&T was favoring its Long Lines Department in the matter of interconnection, AT&T replied in its letter of September 28, 1973

> With respect to Long Lines, the associated Bell System companies do not furnish it facilities except local and intrastate telecommunications services provided under tariff for administrative services. The Bell System companies, including AT&T through its Long Lines Department, are engaged in a joint venture providing nationwide interstate communications service. Neither Western Union, nor MCI, nor any other specialized carrier is involved in that joint venture.

In a previous letter of September 5, 1973, AT&T likewise referred to the "joint provision by the Bell System Associated Companies and the Long Lines Department of their telecommunications services" and asserted that "[c]ertainly the Associated Companies will not participate in a through service with MCI."

19. Pursuant to the directions of the Commission, after its consideration of the comments of MCI and AT&T, Chairman Dean Burch advised AT&T on October 4, 1973, that the proposal to file the tariffs with state commissions was in conflict with the statutory scheme of the Communi-

cations Act since the facilities to be offered are to be used for the transmission of interstate communications and are therefore subject to the filing requirements of Section 203 of the Act. AT&T was therefore directed to file tariff schedules with this Commission which "will provide the interconnection facilities *essential to the rendition by the specialized carriers of all their authorized services* on terms and conditions which are just, reasonable and nondiscriminatory" (emphasis supplied). The letter order further directed that, pending the filing of such tariffs, "there should be no delay in honoring requests of specialized carriers for interconnection facilities *required by such carriers to terminate the services they are authorized by the Commission to furnish*" and that the facilities "can be provided under contracts on an interim basis and *we assume that this will be done*" (emphasis supplied). While some doubt might have existed previously as to whether Bell was under an affirmative order of the Commission to provide MCI and other specialized carriers with interconnection facilities for the latters' authorized services, our October 4, 1973 letter order, which was issued after full consideration of Bell's representations, should have gone far to resolve that doubt.

20. Bell further argues, however, that the prior orders of the Commission on the subject of interconnection did not mention FX and CCSA services and consequently that they did not encompass interconnection facilities for such purposes. In considering this contention we must first take into account the nature of the *MCI* and *Specialized Common Carrier Services* proceedings. In the *MCI* case the applicant was seeking authorization to engage in the business of providing interstate private line communications services, and its primary concern at that time insofar as interconnection is concerned was the availability of loop service to connect its facilities with the premises of its customers. It appeared that its prospective customers were not interested in constructing their own facilities and it

seemed likely that unless arrangements for loop service could be made with the local telephone company, MCI would not be able to commence operations even if its applications were granted. Understandably, then, it concentrated on the matter of loop service and did not reach the question of what interconnection might subsequently be necessary. The *Specialized Common Carrier Services* proceeding involved rulemaking for the determination of basic policies with respect to the provision of private line services by the specialized carriers. While FX and CCSA are not specifically mentioned in the *Specialized Common Carrier Services* decision, this is because we were concerned with private line services generally and did not specifically focus on interconnection for FX and CCSA services or any others. It should be noted that the Commission considered the possibility of the "total diverson" of Bell's private line revenues, although the possibility was deemed to be remote. We would not have discussed this remote possibility of a "total diversion" of Bell's private line services if the competition offered by the specialized carriers were not to include FX and CCSA services, which account for a substantial share of Bell's total private line revenues. These services come within the terms of our order, and rightly so, because there is no distinction in principle to separate them from other types of interconnection. In this respect, we note also in Attachment C to the comments filed by Bell on October 1, 1970, Bell listed FX as a private line service and CCSA as equipment available to the private line customers, and in its tariffs and in numerous other documents the carrier consistently lists CCSA and FX as private line services.[14]

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[14] Bell argues in this proceeding that the Commission's brief in the Ninth Circuit in *Washington Utilities and Transportation Commission* v. *FCC*, No. 71-2119 (argued February 15, 1973), took the position that "only local loops to the premises of the specialized carriers' customers were contemplated in Docket No. 18920." (Bell Br. 20.) In that case, which is on review of the Commission's

21. While the October 4, 1973 letter order similarly did not specifically mention FX or CCSA, no significance should be attached to its failure to do so. The reference therein to all of the authorized services of the specialized carriers and the direction to honor requests for interconnection facilities required by the specialized carriers to terminate the services they are authorized by the Commission to furnish are certainly broad enough to encompass interconnection for FX and CCSA services. In fact, we believe that the circumstances leading up to the issuance of the letter order further demonstrate that Bell knew or should have known that interconnection for the purpose of enabling the specialized carriers to provide FX and CCSA services was covered therein. In MCI's letter of August 27, 1973, it complained that the Bell System companies were arbitrarily deciding what types of service they would supply although they "were providing a full range of services to the Long Lines Department and Western Union in direct competition to MCI." At the oral argument of this Docket No. 19896 proceeding, Bell denied that it had engaged in "negotiations" with MCI for FX and CCSA services but conceded that "it would be fair to say for MCI that they have asked for FX and CCSA connection for some period" (Tr. 222). Manifestly, therefore, Bell has been aware for some time that MCI was seeking FX and CCSA services, but in its answer to the Commission's request for a response to MCI's complaint, although Bell raised a number of objections to the Commission action, it made no claim that FX and CCSA required special or different treatment than interconnection for the

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Specialized Common Carrier Services decision, the Commission's brief did contain language which suggests that local loop service to a customer's premises was at issue there. Such a suggestion does not take fully adequate account of the reach of our decision. The Commission's brief did not address the interconnection issue directly, however, because that issue was not raised in the petitions for review. We hereby instruct our counsel to forward a copy of this order to the Ninth Circuit to dispel any ambiguities that the brief may have created.

purpose of providing other private line services. In these circumstances, Bell's failure to make such a claim justifies the inference that it did not consider special or separate treatment to be warranted.

22. Moreover, the interpretation which Bell would place on our previous rulings would be inconsistent with the basic purposes and objectives of the action which we took and with the public interest. In each of the proceedings discussed above, our action was taken to insure that competition in the provision of interstate private line communications services would be on a full, fair, and nondiscriminatory basis and that the specialized common carriers would not be excluded from that market by reason of the monopoly control by Bell and other telephone companies over local distribution facilities. Bell presently has arrangements with its Long Lines Department and with numerous independent telephone companies for access to its local distribution facilities for the purpose of enabling Long Lines and the independent telephone companies to provide FX and CCSA services, and the income derived from these types of services represents a very substantial proportion of the carrier's income from private line services. If MCI and other specialized carriers are excluded from this market, they will be at a definite disadvantage in obtaining and holding subscribers to any of their private line services, including those point-to-point services which are not being challenged by Bell. A prospective private line customer who needs FX or CCSA services for part of his communications requirements is likely to be discouraged from obtaining any private line service from a carrier which is unable to supply the local distribution required for all of his needs. Thus, if Bell's contentions are accepted, Long Lines and the independent telephone companies will be in a position to exclude MCI and other specialized carriers from the interstate private line common carrier business, not by reason of their superiority, but because of the telephone companies' control over the local distri-

bution facilities. However, we have held on the basis of extensive hearings in adjudicatory and rule making proceedings that the public will be benefited by the entry of the specialized carriers into the private line common carrier field and that the public interest will be served by competition on a fair and non-discriminatory basis. Our orders in the several proceedings discussed above were intended to achieve that competitive status and to prevent to the extent possible the unjust or unreasonable discrimination which is prohibited by Section 202(a) of the Act.[15]

23. We therefore hold that our prior orders covered interconnection for the broad range of services which the specialized carriers are authorized to provide and that Bell has been directed to furnish interconnection facilities for the purpose of enabling MCI and the other specialized carriers to provide all such services, including FX and CCSA type services.[16] However, we recognize that our

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[15] Section 202(a) of the Act provides as follows:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

[16] In a civil action filed by MCI against Bell, *MCI Communications Corp. et al.* v. *AT&T et al.*, No. 73-2499, decided December 31, 1973, the United States District Court for the Eastern District of Pennsylvania reached the same conclusion we do as to the scope of our interconnection orders. In that case, the Court granted MCI's request for a preliminary injunction requiring AT&T to provide interconnection to MCI for certain services, including FX and CCSA. However, in an order filed April 15, 1974, the Court of Appeals, on the basis of the doctrine of primary jurisdiction, vacated the District Court's preliminary injunction and remanded the case to the District Court with directions that the court proceeding be stayed until the Commission resolves the issues under consideration in this Docket No. 19896 proceeding.

prior orders may not have been perfectly clear. In this proceeding, therefore, we are again reviewing the question of interconnection. We have given careful consideration to the arguments advanced by Bell in its briefs and at oral argument but, as hereinbefore pointed out, we are of the view that achievement of our objective that competition in the provision of interstate private line communications services be on a full, fair and non-discriminatory basis requires the issuance of broad interconnection orders. Our orders herein therefore make clear that Bell is to provide interconnection facilities for all of the authorized services of the specialized carriers, including FX and CCSA.

24. In its pleadings and at oral argument Bell has strenuously contended that substantial and significant differences exist between interconnection for FX and CCSA services and interconnection for other private lines services and that, by reason of these differences, an evidentiary hearing is essential before a final determination is made on the subject of interconnection for these services. The question of whether an evidentiary hearing is necessary has been considered twice before. In our Memorandum Opinion and Order to Show Cause which initiated this proceeding we held that there "appears to be no material disputed fact and thus no necessity for designating these matters for an evidentiary hearing" 44 FCC 2d 245 at 250. Bell's petition for reconsideration of this determinaton was denied by a Memorandum Opinion and Order (FCC 74-140) wherein we held that Bell's allegations were insufficient to justify an evidentiary hearing. However, in view of the carrier's representations at the oral argument, we believe that some additional comments are warranted.

25. First, Bell asserts that, since interconnection for FX and CCSA permit access to its switched telephone network, substantially different and more serious problems are presented than interconnection for other private line services. In this respect we note, as previously discussed in this

Decision, that Bell presently provides such interconnection to its Long Lines Department and to numerous independent telephone companies. Therefore, unless a substantial showing is made that significant differences exist by reason of the different ownership of the private line facilities which justify or necessitate different treatment, Bell must provide comparable interconnection facilities to both in order to avoid the proscription of unreasonable discrimination set forth in Section 202(a) of the Act. As we stated in our order denying reconsideration, a recitation of broad and general areas of inquiry which it desires to have explored in an evidentiary hearing, unsupported by factual allegation which demonstrate a need for such a hearing, is not sufficient. We adhere to that view. The general questions raised by Bell relate primarily to matters which would be within the knowledge of Bell or its employees.[17] It was therefore incumbent upon Bell to come forward with specific factual allegations and engineering or other supporting statements to demonstrate that there are significant unresolved factual questions which require a hearing. Since it has not done so, we again reject its contention that exploration of these matters requires an evidentiary hearing.

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[17] We deem it unnecessary to list all the questions raised by Bell. However, we believe that the three set forth below illustrate the general type of inquiry requested by it. They are as follows:

(a) Th extent to which physical connection with MCI would involve connection into the central offices of the Bell System companies and remove insulation of the network from defective operations in the MCI system.

(b) The extent to which such physical connection would involve specialized carriers in the network management function of the telephone companies and the effects on the telephone using public.

(c) The effect of such physical connection as requiring specialized planning, controlled implementation, segmented operation, divided maintenance responsibility and complex administrative procedures.

26. Bell further argues that there is no basis for a claim of discrimination in favor of its Long Lines Department since no comparable situation exists between the arrangements with Long Lines and the provision of interconnection facilities to MCI and other specialized carriers for FX and CCSA. It maintains that interconnection is not provided to Long Lines for these services but rather that Long Lines and the Associated Companies "are partners in the joint provision of interstate services." Asserting that extensive carrier cooperation is required in order to effectuate through services for FX and CCSA and that its switched network is a highly complicated single entity, Bell argues that through services will not be as beneficial to the public if the participating carriers function at arms length as competitors rather than as partners. With respect to its arrangements with the independent telephone companies for FX and CCSA services, Bell states that the independent companies do not operate on parallel routes or duplicate Bell's facilities and are therefore not competitors; that, consequently, a partnership arrangement could likewise be effected with the independent telephone companies. We cannot accept these alleged differences between a partner and a competitor as constituting a valid distinction which justifies Bell's withholding the requested facilities from MCI. Whether the interstate transmission of the communication is performed by MCI, Long Lines or an independent telephone company, access to the distribution facilities of the local telephone company is essential in order to enable the customer to obtain FX and CCSA services and to complete the interstate communication. Thus, the interconnecting facilities from the interstate carrier, whether MCI, Long Lines or an independent telephone company, to the local telephone company is a vital link in the transmission of the interstate communication, and must be provided on a non-discriminatory basis pursuant to Sections 201(b) and 202(a) of the Act. Consequently, unless there are significant technical or other con-

siderations of substance which indicate that interconnection would result in damage to Bell's system or would have an adverse effect upon service to the public, Bell must provide the interconnection facilities requested by the specialized carriers.

27. Such technical considerations exist with respect to interconnection for FX and CCSA, it is argued, because allowing access to the local telephone company's switched network for the benefit of a non-partner makes possible the introduction of incompatible equipment which could cause damage to the switched network. However, the specialized carriers are the ones seeking interconnection and they certainly realize that they are dependent upon the telephone company for the desired local distribution facilities. In the circumstances it is inconceivable that they would utilize incompatible equipment and thus justify the refusal of the services which they need. Furthermore, Bell can include in its tariff any reasonable conditions which are necessary to protect its system as prerequisites to the provision of interconnection. Should a specialized carrier fail or refuse to comply with such a reasonable condition, a denial of interconnection would be justified. When and if a claim of possible damage to the telephone system in a particular case is presented to the Commission by Bell, properly supported by engineering statements or other data, we shall of course determine the question on the basis of the pleadings and evidence submitted. However, Bell concedes that it had established a working arrangement with the independent telephone companies, as well as its own Long Lines Department for access to its switched network without serious damage to its telephone system, and we find no reason to believe that, if a good faith effort is made to do so, like arrangements cannot be agreed upon with the specialized carriers.

28. An evidentiary hearing is required also, Bell asserts, because interconnection to allow competitors access to the

local distribution facilities of the telephone company is likely to prejudice seriously the overall management and planning which is essential to the efficient operation of the telephone system. It insists that the matter should be further explored to determine whether interconnection will result in an inadvisable or unacceptable division of responsibility and to determine what additional costs will be incurred by Bell as a result of the increased management and planning required and how it will be reimbursed for such costs.

29. We agree that management and planning are important, but we fail to find any sufficient factual allegations to indicate the existence of unresolved material issues which require a hearing for their resolution. MCI has expressed its willingness to cooperate fully with Bell in the matter of planning and, of course, it is to MCI's benefit to do so. The same is true as to the other specialized carriers which desire such service. We have considered the contentions advanced by Bell in its brief and in its oral argument but are not convinced that the necessity for obtaining sufficient information from a competitor in order to discharge its management and planning functions poses problems of such increased magnitude over obtaining like information from an independent telephone company as to warrant a difference of treatment. As for the costs which may be incurred in the discharge of any additional managerial or planning responsibilities, Bell and the other telephone common carriers may include such costs in their tariffs for the requested services.

30. Other arguments advanced by Bell in support of its request for an evidentiary hearing have been considered but we find them to be without substance. All of the salient facts necessary to a resolution of the issues in this proceeding have been developed fully in the prior adjudicatory and rule making proceedings discussed above and in the pleadings and oral arguments of the parties to this Docket

No. 19896 proceeding, and a prompt decision is essential in the public interest.

IV. *The Appilcation for Review*

31. In a letter dated October 19, 1973, the Chief of our Common Carrier Bureau advised MCI that it was entitled to receive from telephone companies various types of interconnection, including connection into the local exchange facilities for furnishing FX and for insertion of its facilities into a telephone company's CCSA. Bell filed an application for review, contendng that the action was beyond the Bureau Chief's delegated authority and in violation of Bell's right to a hearing under Section 201(a). We deem it unnecessary to determine whether the Bureau Chief acted within the scope of his authority since we have disposed of Bell's other contentions on the merits in the discussion set forth above. We shall therefore dismiss the Application for Review as moot.

V. *Interconnection for Domestic Satellite Carriers*

32. In the *Domestic Satellite* proceeding, 42 FCC 2d 654 at 660 (1973), the Commission required as a condition to the authorizations granted Bell for domestic satellite facilities, that the charges and practices with respect to interconnection facilities "shall be set forth in tariff schedules to be filed pursuant to Section 203 of the Act and Part 61 of our Rules . . ." in order to insure that domestic satellite carriers will be able to compete with existing carriers in providing end-to-end service. Bell filed tariffs with this Commission but under protest. It also filed tariffs with various state regulatory commissions, however, claiming that the local distribution facilities involved were intrastate and not subject to Commission jurisdiction. Except for Bell's argument, heretofore rejected, that all local distribution facilities, even if used for the trans-

mission of interstate communications, are intrastate, Bell has not shown any special circumstances which would require state regulation. The domestic satellite carriers contend, and Bell does not deny, that all of their communications are interstate. Thus, all interconnections for domestic satellite carriers to be used for their interstate services must be provided pursuant to tariffs filed with this Commission, and all charges for the services and facilities provided must be made pursuant to such tariffs.

VI. *The Western Union Contracts*

33. Next we turn to Western Union's contracts with Bell for exchange of facilities. For a number of years, Western Union has leased a substantial portion of its local distribution facilities from Bell pursuant to privately negotiated contracts. The contracts currently in force became effective on January 1, 1970 and were filed with the Commission pursuant to Section 211 of the Communications Act of 1934, as amended. The contracts have no fixed term but are terminable by either party upon the giving of five years written notice. Bell gave Western Union notice of termnation of the contracts on September 28, 1973. Thus, by their terms, the contracts will remain in effect until September 28, 1978. Although the contracts are called "exchange of facilities" contracts, it is undisputed that at this time there are no consequential exchanges of facilities, but only the leasing of Bell facilities by Western Union.

34. Bell asserts that the exchange of facilities contracts are not common carrier offerings subject to Commission jurisdiction, that the contracts are superseded by the tariffs, and that in any event, the facilities in question are intrastate and subject to state regulation. It therefore filed tariffs with various state regulatory commissions covering access to its local distribution facilities. After the Commission's letter of October 4, 1973, Bell filed tariffs

with the Commission, under protest, for the local distribution facilities used by Western Union.

35. In our review of Bell's dealings with the various specialized, satellite, and international record carriers, we found that access to the local distribution facilities of the telephone company is necessary for the completion of the carriers' interstate or foreign networks and that the requested facilities will be used for the transmission of interstate or foreign communications and are therefore subject to the jurisdiction of this Commission. To the extent that the services and facilities provided to Western Union by Bell are used for the transmission of such interstate communications they likewise are subject to this Commission's jurisdiction. Therefore, nothing more needs to be said with respect to Bell's argument that interconnection with the local distribution facilities is a matter solely for state regulatory action even though the services and facilities are used for the transmission of interstate communications.

36. The further contention advanced by Bell that this Commission has no jurisdiction over the contracts must be rejected. In our view Section 211(a) of the Act, which requires the filing "of all contracts, agreements, or arrangements with other carriers . . . in relation to any traffic affected by the provisions of the Act . . .", contemplates regulatory supervision by the Commission. Since both Bell and Western Union are fully subject carriers engaging in interstate communications, Section 211(a) required the filing of their exchange of facilities contracts with the Commission, and this has been done. While Section 211(a) does not specifically invest regulatory authority over the contracts, it is reasonable to conclude that the provision which requires the contracts to be filed confers upon the Commission the authority to determine whether the terms and conditions thereof are consistent with the provisions of the Act. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). Other provisions of the Act also sup-

port the Commission's regulatory authority over such contracts.

37. Section 214(a) of the Act provides that no carrier can "discontinue, reduce or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public interest, convenience or necessity will be adversely affected thereby." It appears from the pleadings before us that Bell proposes to take action which will result in the discontinuance or impairment of services which heretofore have been provided under the contract and there is no basis for distinguishing between services provided pursuant to a contract and services pursuant to a tariff insofar as the coverage of Section 214 is concerned. Manifestly, the regulatory scheme of the Act and the public interest requires that we review any actions taken in alleged violation of a contract or a tariff to insure compliance with Section 214. See also Section 4(i) of the Act.[18]

38. Particularly in the circumstances of this case, Section 202(a), which provides that "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination . . . by any means or device . . .", requires that we assert jurisdiction. A contract is a "device" within the meaning of the Act (*Cf. Armour Packing Co.* v. *United States,* 209 U.S. 56 (1908)), and, as will be discussed below, the record in this proceeding raises serious questions concerning whether Bell-Western Union contracts involve "unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services."

39. Bell's reliance on the Commission's letter of December 20, 1945 is misplaced. The letter was not a dis-

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[18] In pertinent part, Section 4(i) authorizes the Commission to "perform any and all acts, . . . and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

claimer of jurisdiction as alleged by Bell. Although the Commission, at that time, did not require the inclusion of Bell's arrangements with Western Union in its tariffs, it did say "that such arrangements are a matter of concern to the Commission under the provisions of the Communications Act, and they will be given consideration by the Commission in appropriate instances." Thus the Commission recognized that circumstances might arise which would require Commission action and it was of the view that it had jurisdiction to take such action. Circumstances now exist which make such action both appropriate and necessary in the public interest. During the more than 25 years which have elapsed since the letter was released, there has been a proliferation of new types of common carrier services, and the decisions in the *Specialized Common Carrier Service, Domsat* and *MCI* cases have contributed to the establishment of new specialized carriers which compete not only with Bell's Long Lines Department but also with Western Union. These carriers rely on Bell for interconnection facilities, and the Commission has stated its concern that competition among competing carriers be fair. Accordingly, to the extent that the Bell-Western Union contracts affect competition it is now necessary that the Commission assert its jurisdiction.

40. We also hold that Bell cannot supersede, modify or terminate its contracts with Western Union merely by filing tariffs or taking other unilateral action. In the light of court decisions interpreting comparable legislation, it appears that, except as expressly modified by statute, Bell's contractual obligations with Western Union are governed by common law and can be changed or modified only in accordance with the procedures set forth in the contracts or the Communications Act. In interpreting the Natural Gas Act, which is similar in several significant respects to the Communications Act,[19] the Supreme Court held that

[19] The Natural Gas Act requires the filing of contracts with the Federal Power Commission (Section 4(c)); provides for the filing

contracts for services could not be abrogated by the filing of new schedules of charges. *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956). The Court held that "by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts." *Id* at 338. The Court went on to say that "absent the Act, a unilateral announcement of a change to a contract would of course

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by every natural gas company of schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission (Section 4(c)); prohibits any change in such rate, charge, classification, or service except after a specified notice to the Commission, unless the Commission otherwise orders (Section 4(d)); after a new schedule is filed, the Commission is authorized in accordance with certain specified procedures to hold a hearing concerning the lawfulness of any changes made by a new schedule, suspend the operation of such schedule and make such orders as are necessary and proper in connection with such suspension (Section 4(e)); and the Commission has authority after a hearing to determine the reasonableness of the rates, charges, or other provisions of the schedules, to make the necessary and appropriate orders with respect thereto, including a determination of just and reasonable rates (Section 5(a)).

In comparable provisions, the Communications Act requires the filing of contracts with this Commission (Section 211(a)); requires every common carrier, except connecting carriers, to file with the Commission schedules showing all charges for itself and its connecting carriers for interstate and foreign communications (Section 203(a)); prohibits any change in the charges, classifications, or other matters specified in the schedules except after notice to the Commission and authorizes the Commission to modify the notice requirements (Section 203(b)); prohibits any carrier from engaging or participating in any such communications unless schedules have been filed (Section 203(c)); and authorizes the Commission with respect to any new charges, classification, or other change in a schedule to hold a hearing concerning the lawfulness thereof, suspend the operation of such charges or other matters for a specified period of time, and after hearing make such order with reference thereto as may be necessary and proper including the reasonable charges and practices thereafter to be observed (Sections 204 and 205).

be a nullity . . ." and there is not basis for finding that imposition of filing and notice requirements for tariffs was intended to make effective action which would otherwise be of no effect. *Id* at 339. In a companion case which interpreted virtually identical provisions of the Federal Power Act, the Court also concluded that contracts cannot be changed by unilateral filings authorized by the Act. *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Applying the holdings of the Court to the Communications Act, it is clear that neither common law nor the Act authorizes Bell unilaterally to alter its contracts with Western Union.

41. Bell argues that requiring it to adhere to its contractual obligations would constitute a prescription of rates without a hearing in violation of Section 205(a) of the Act.[20] At this time, however, the Commission is not determining rates but is only considering the effect which a tariff filing would have on Bell's contractual obligations and the provision of facilities and services pursuant thereto. Bell's charges to Western Union for such services and facilities were prescribed in their contracts. This con-

[20] Section 205(a) provides as follows:

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

struction of the contracts and the Act is consistent with the holding in *United Gas Pipe Line Co.* v. *Mobile Gas Corp., supra,* and is not refuted by the cases relied on by Bell which hold that a Section 205 prescription requires a finding that the rates and terms prescribed are just and reasonable. *AT&T* v. *FCC,* 449 F 2d 432 (2nd Cir. 1971), and that the Commission cannot impose a nonstatutory prerequisite for the filing of otherwise lawful tariffs, *AT&T* v. *FCC,* 487 F2d 865, 28 RR 2d 1025 (2nd Cir. 1973). Here, Bell has obligated itself by contract to provide certain services and facilities to Western Union on the terms and conditions specified therein and its act of filing tariffs which seek to change and modify the terms of the contract is a nullity. See *Richmond Power and Light, Richmond, Indiana* v. *Federal Power Commission,* 481 F2d 490 (D.C. Cir. 1973). Thus, it is by reason of its contractual obligations that Bell is precluded from changing or modifying the services and facilities heretofore provided to Western Union and the charges therefor, not by reason of any action of the Commission in prescribing rates.

42. In our Memorandum Opinion and Order, *In the Matter of Bell System Tariffs re Entrance, Intercity and Local Distribution Facilities for Other Carriers,* FCC 74-36, released January 11, 1974, we deferred action on requests for rejection of the tariffs specified therein pending a resolution of the issues designated in this show cause proceeding, and certain action is called for at this time. To the extent that Bell's tariffs provide for services and facilities presently furnished to Western Union under the exchange of facilities contracts, controlling judicial precedent requires that the tariffs be rejected insofar as the said services and facilities furnished to Western Union are concerned. *United Pipe Line Co.* v. *Mobile Gas Corp., supra* at 347; *Richmond Power and Light, Richmond, Indiana* v. *Federal Power Commission, supra.* See also, *Municipal Light Boards of Reading and Wakefield, Massachusetts* v. *Federal Power Commission,* 146 U.S. App. D.C. 294, 450 F 2d

1341 (1971), *cert. denied,* 405 U.S. 918. While the tariffs are not herein being rejected as to the other carriers, the record in this proceeding raises serious questions as to whether the rates in the contracts or in the tariffs are unreasonably high, unreasonably low, or otherwise discriminatory and therefore unlawful in violation of Sections 201(b) and 202 of the Act. The satellite carriers and others complain that Bell's tariffs are unduly restrictive, and they argue that Western Union is afforded access to facilities which they are denied under tariff, and that it is being afforded preferential rates. Western Union's complaint with respect to Bell's attempt to abrogate its contracts by filing tariffs points up discrepancies between the tariffs and the contracts, alleging that implementation of the tariffs will result not only in a reduction of services but an increase in rates, ranging from 55 percent to 222 percent depending on the state involved, with an average increase of 131 percent. If such a substantial increase in rates is justified, then the contractual rates are unreasonably low and confer an unlawful preference or advantage upon Western Union over its competitors which likewise must obtain such services from Bell. If, on the other hand, the tariff rates are unreasonably high, all of the carriers which require such facilities from Bell are prejudiced thereby and the tariffs would be unlawful for that reason.

43. While *United Gas Pipe Line Co.* v. *Mobile Gas Corp., supra, and Federal Power Commission* v. *Sierra Pacific Power Co., supra,* held that contractual obligations could not be avoided by the unilateral act of filing a tariff, they expressly recognized the authority of the regulatory agency, either on its own motion or on the complaint of an affected party, to investigate the contractual rates and to modify or prohibit any rate which is found to be unreasonable, discriminatory or otherwise unlawful under the terms of the relevant statute. Thus, the Commission has the authority, and indeed an obligation, to determine

the propriety of the terms and rates of the contracts as well as those of the tariffs.

44. This proceeding, however, is not the appropriate vehicle for determining the validity of Bell's rates for services to either Western Union or to the other carriers since such an investigation would necessarily involve a thorough exploration of matters and issues which are well beyond the scope of this proceeding. Thus, in order to determine whether the contract or tariff rates are unreasonably high, unreasonably low, or otherwise discriminatory, we must ascertain and compare the nature of the facilities and services provided to Western Union and the other carriers, whether circumstances exist which justify different charges to different carriers, and consider all other facts and circumstances submitted by the parties which are deemed relevant to the resolution of the questions presented. In our aforementioned Memorandum Opinion and Order, FCC 74-36, involving the validity of Bell System tariffs, we stated that further investigation into the lawfulness of the tariffs was warranted, but that we would defer such action pending the conclusion of this Docket No. 19896 proceeding since similar issues are involved. We further stated, however, that an investigation would be instituted with respect to any issues not resolved in this proceeding. Expeditious action by the Commission will therefore be taken to initiate a separate proceeding to determine the validity of Bell's tariffs and its charges to Western Union and the specialized carriers, and to explore all other issues which are deemed necessary to the resolution of any questions relevant to the determination of the lawfulness of Bell's actions and the further remedial action required in the light thereof.

VII. *Remedial Action*

45. We find and conclude that Bell engaged in conduct which has resulted in the denial of, or unreasonable delay

in establishing, physical connections with MCI and other specialized common carriers which are parties to this proceeding; that it pursued policies and practices which foreclosed the establishment of through routes, and the charges, facilities and regulations applicable thereto in connection with authorized interstate services of MCI and other specialized carriers; that Bell is unlawfully applying and proposes to continue to apply the tariff schedules of charges and regulations filed with state regulatory commissions for services and facilities provided to MCI and other specialized common carriers and used by the specialized carriers in the transmission of interstate and foreign communications; and that Bell has discriminated against MCI and other specialized carriers in favor of its own Long Lines Department by denying to MCI and other specialized carriers the interconnection privileges presently provided to the said Long Lines Department in connection with authorized interstate services. We further conclude that the aforementioned conduct and practices are in violation of the Act, and the declared policy of the Commission; and that the public interest requires the issuance of orders requiring Bell to cease and desist from further violations.

46. Bell asserts that the statutory prerequisites to the issuance of cease and desist orders pursuant to Section 312(b) of the Act[21] have not been met and that the issuance of such orders is not permissible in this proceeding under that provision of the Act. However, in view of the possible uncertainty as to the scope of our prior orders, we are not invoking Section 312(b) and we need not de-

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[21] Section 312(b) of the Act provides as follows:

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

cide the applicability thereof. We are proceeding instead under Section 205(a) of the Act [22] which was also cited as a basis for this proceeding and under that Section broad authority to issue cease and desist orders is conferred upon the Commission. In pertinent part Section 205(a) provides that if the Commission determines "after a full opportunity for hearing" that a "charge, classification, regulation, or practice" of a carrier "is or will be in violation" of the Act, the Commission is authorized "to determine and prescribe what will be" an appropriate charge and "what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, . . .". Under these provisions, the Commission is authorized to issue orders not only with respect to past violations but for practices thereafter to be followed, and to issue cease and desist orders for violations which the Commission finds "will exist." We believe that these provisions are applicable here.

47. Bell has been accorded full opportunity for hearing in the several proceedings heretofore held on the subject of interconnection. In addition it was accorded an opportunity for further hearing in this Docket No. 19896 proceeding, and it took advantage of that opportunity by filing extensive pleadings and presenting oral argument before the Commission *en banc*. We have considered its contentions but are persuaded by the representations of Western Union and the specialized carriers in their briefs and at oral argument that affirmative orders must be issued to require Bell to provide interconnection facilities for the authorized interstate and foreign communications services of the aforementioned carriers and to provide such facilities pursuant to charges, conditions, and terms specified

[22] For the full text of Section 205(a), see footnote 20, supra.

in tariffs filed with this Commission. We further conclude that cease and desist orders pursuant to Section 205 are required in the public interest to insure compliance by Bell with the affirmative interconnection orders issued herein.

48. The show cause order in this proceeding was directed only to American Telephone and Telegraph Company and to the Bell System operating companies. Consequently, cease and desist orders are appropriate only against such companies and will not be issued against any non-Bell companies. However, we wish to place all telephone companies on notice that our policy declarations with respect to interconnection apply to them as well as to the Bell companies. We also emphasize that we expect compliance by all telephone companies with such policy declarations and the orders issued pursuant thereto in the absence of a substantial showing that a particular request for interconnection would result in damage to the telephone system or is otherwise inconsistent with the public interest. Should such compliance not be forthcoming, the offending company will be made the subject of a show cause proceeding or other appropriate remedial action will be taken expeditiously.

49. Bell has filed tariffs with the Commission for interconnection facilities furnished to domestic satellite carriers, and we believe that such filing complies with the condition imposed on its domestic satellite authorizations in 42 FCC 2d at 660. Therefore we do not deem it necessary or appropriate to revoke or modify Bell's authorizations even though the carrier also filed tariffs with state commissions for such interconnection facilities. Neither do we consider it necessary to require the withdrawal of the state tariff filings. Our Decision here and the orders issued pursuant thereto directs Bell to provide interconnection facilities to other carriers for their authorized interstate and foreign communications services and to do so only pursuant to

charges, terms and conditions contained in tariffs filed with the Commission. The relief thus provided will afford adequate protection to all of the complaining carriers in this proceeding since the state tariffs cannot be applied to any interconnection facilities furnished for use in the transmission of interstate or foreign communications or the charges therefor.

50. As indicated above, we have rejected the tariffs filed by Bell insofar as they relate to the services and facilities heretofore furnished to Western Union pursuant to the exchange of facilities contracts and we propose to determine in a separate proceeding whether the contract charges and conditions are unreasonable or otherwise unlawful. However, we note that some facilities for which provision is made in the tariffs are not covered by the contracts. To the extent that Western Union utilizes facilities not covered by contract, the tariffs filed with this Commission will apply.

51. Other carriers have alleged that they also have contractual arrangements with Bell which are jeopardized by the filing of tariffs with state commissions and that they are entitled to orders requiring Bell to maintain the status quo. It may be that there is merit to this contention but we do not believe that this is the proper proceeding in which to make that determination. In the first place, we note that some of the arrangements for the provision of facilities are alleged to be pursuant to unwritten agreements and we would need additional information as to these arrangements before undertaking to take remedial action. Furthermore, our orders herein with respect to the applicability of Federal tariffs to the provision of these interconnection facilities and our determinations as to the force and effect of the Western Union contracts may resolve the controversy between Bell and the other carriers with which it has contractual arrangements so that an amicable solution may be reached. If, however, a solution is not reached, the matter may be submitted for further consid-

eration in a separate proceeding where a determination may be made on the basis of the pleadings of all parties concerned and such hearing as may be necessary to develop fully all the pertinent facts and circumstances.

52. The suggestion has been made that the provision of facilities for the transmission of interstate and foreign communications by one common carrier to another carrier be made pursuant to contracts between the carriers. While we believe that there is merit to this suggestion we shall not undertake to resolve that matter in this proceeding. Rather, we believe that this question should be deferred for consideration in the proceeding we propose to institute for investigation into the reasonableness of the rates and terms of the Western Union contracts.

53. ACCORDINGLY, IT IS ORDERED, that American Telephone and Telegraph Company and the Bell System companies enumerated in paragraph 18 of our Memorandum Opinion and Order to Show Cause, 44 FCC 2d 245 at 251, comply with the following not later than ten days after the release of this Decision:

(a) Furnish to MCI Telecommunications Corporation MCI New York West, Inc. and other specialized common carriers the interconnection facilities essential to the rendition of all of their presently or hereafter authorized interstate and foreign communications services and to enable the said specialized common carriers to terminate their authorized interstate and foreign communications services, including interconnection by the specialized carriers into a telephone company's local exchange facilities for the purpose of furnishing Foreign Exchange (FX) service or for insertion into telephone company Common Control Switching Arrangements (CCSA);

(b) Furnish the interconnection facilities specified in subparagraph (a) above on reasonable terms and

conditions; and file with the Commission pursuant to Section 203 of the Act and Part 61 of the Commission's Rules, tariff schedules to cover interconnection facilities for all of the authorized interstate and foreign communications services of the specialized common carriers;

(c) The specialized common carriers shall be charged for the interconnection facilities and services furnished by American Telephone and Telegraph Company and the Bell System companies, in connection with the transmission by the specialized carriers of authorized interstate and foreign communications and the provision of authorized interstate and foreign communications services, solely and exclusively pursuant to the charges, terms, and conditions specified in tariffs filed with the Commission; and

(d) Furnish to the specialized carriers for their authorized interstate and foreign communications services, interconnection facilities similar to those presently provided to Bell's Long Lines Department on a non-discriminatory basis.

54. It Is Further Ordered, pursuant to the authority contained in the provisions of Section 4(i) and 205(a) of the Communications Act, that American Telephone and Telegraph Company and the Bell System companies shall not later than ten days after the release of this Decision CEASE AND DESIST from:

(a) Engaging in any conduct which results in a denial of, or unreasonable delay in establishing, physical connections with MCI and other specialized common carriers for their presently or hereafter authorized interstate and foreign communications services;

(b) Implementing any policy or practice which forecloses the establishment of through routes, and

charges, facilities and regulations applicable thereto, in connection with MCI's and other specialized common carrier parties' presently or hereafter authorized interstate and foreign communications services;

(c) Implementing any policy or practice which results in denying to MCI or any other carrier party reasonable interconnection services: similar to those provided to the Long Lines Department of the American Telephone and Telegraph Company in connection with the authorized interstate and foreign communications services of such other carriers; and

(d) Charging MCI or the other specialized common carrier parties for interconnection facilities furnished in connection with the authorized interstate and foreign communications services of the said specialized carriers pursuant to tariffs filed with state regulatory commissions or delaying or refusing to furnish requested interconnection facilities for such purposes pending approval by state regulatory commissions of the furnishing of the aforementioned facilities.

55. It Is Further Ordered that:

(a) Insofar as the tariffs filed by Bell include interconnection facilities and services covered by the Bell-Western Union exchange of facilities contracts and used by Western Union in Connection with the provisions of its authorized interstate services, they Are Rejected; and

(b) With respect to any services and facilities not covered by the abovementioned contracts but which are furnished by the Bell System companies for the use of Western Union in connection with the provision of its authorized interstate communications services, the telephone companies shall furnish the said interconnection facilities on reasonable terms and

conditions; and charge Western Union for the provision of such interconnection facilities solely and exclusively pursuant to tariffs filed with this Commission pursuant to Section 203 of the Communications Act and Part 61 of the Rules.

56. It Is Further Ordered, that the Application for Review filed by the American Telephone and Telegraph Company on November 19, 1973, Is Dismissed as moot.

57. It Is Further Ordered, that the unopposed motions to correct the transcript of oral argument in this case filed on March 12, 1974, by Southern Pacific Communications Company; on March 15, 1974, by American Telephone and Telegraph Company; on March 18, 1974, by CML Satellite Corporation and American Satellite Corporation; on March 19, 1974, by Western Union Telegraph Company; on March 20, 1974, by ITT World Communications, Inc., and Western Union International, Inc.; on March 21, 1974, by the Commission's Common Carrier Bureau and jointly by MCI Telecommunications Corporation and MCI New York West, Inc.; and on March 22, 1974, by Western Tele-Communications, Inc. ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

APPENDIX

The pleadings considered by the Commission in this docket are:

(1) Briefs filed on January 21, 1974 by:

a. The Bell System Companies
b. United Telephone System
c. GTE Service Corporation
d. United States Independent Telephone Association
e. Western Union Telegraph Company
f. Midwestern Relay Co. and CPI Microwave, Inc.
g. MCI Telecommunications Corporation and MCI New York West, Inc.
h. CML Satellite Corporation
i. RCA Global Communications, Inc.
j. Data Transmission Company
k. N-Triple-C Inc.
l. Southern Pacific Communications Company
m. Western Tele-Communications, Inc.
n. American Satellite Corporation
o. Common Carrier Bureau

(2) Brief, filed January 22, 1974, by Western Union International, Inc.

(3) Reply Comments filed February 1, 1974, by ITT World Communications, Inc.

(4) Reply Briefs, filed February 4, 1974, by:

(a) Bell System Companies
(b) The United Telephone System
(c) United States Independent Telephone Association
(d) Western Union Telegraph Company
(e) Data Transmission Company
(f) N-Triple-C Inc.

(g) American Satellite Corporation
(h) Western Tele-Communications, Inc.
(i) Southern Pacific Communications Company
(j) Common Carrier Bureau

(5) Reply brief, filed February 5, 1974, by MCI Telecommunications Corp. and MCI New York West, Inc.

(6) Further Reply Briefs filed February 11, 1974, by:

(a) MCI Telecommunications Corporation and MCI-New York West, Inc.
(b) ITT World Communications, Inc.
(c) Data Transmission Company

(7) Reply Brief of CML Satellite Corporation, filed February 11, 1974.

(8) Reply Comments of Western Union International, Inc., filed February 12, 1974.

Separate Dissenting Statement of Commissioner Charlotte T. Reid (Docket 19896)

I dissent from the majority's decision as it relates to paragraph 31, Application for Review, filed by AT&T (letter from Chief, Common Carrier Bureau, dated October 19, 1973, to MCI).

I dissent because I do not agree that it is a moot issue, even though we may have decided the matter on the merits.

I have expressed my concern many times that I felt there was a problem with the so-called "delegated authorities" to many of our Bureaus, not just the Common Carrier Bureau, and in this instance I believe that the Bureau Chief went beyond his delegated authority. I believe this to be even more apparent when one considers the fact that there was a reasonable basis for confusion as to what interconnection had been ordered. Therefore, for the Bureau Chief to conclude that such was not the case, without inquiry to the Commission, is simply more than I can accept.

Let me hasten to add that our present review of *all* delegations of authority should, I trust, prevent any further such instances from occurring in the future, but I must dissent from the majorities disposition of AT&T's Application for Review.

APPENDIX C

APPENDIX C

No. 74-1386

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA and THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioners

VS.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,
Respondents

MCI Telecommunications Corporation and
MCI-New York West, Inc.
N-Triple C, Inc.
Data Transmission Company (Datran)
American Satellite Corporation
Southern Pacific Communications Company
CPI Microwave, Inc.
Western Tele-Communications, Inc.
CML Satellite Corporation
Western Union Telegraph Company
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia
Cincinnati Bell, Inc.
Illinois Bell Telephone Company
Indiana Bell Telephone Company
Michigan Bell Telephone Company
Mountain States Telephone and Telegraph Company
New England Telephone and Telegraph Company
New Jersey Bell Telephone Company
New York Telephone Company
Northwestern Bell Telephone Company
The Ohio Bell Telephone Company
Pacific Northwest Bell Telephone Company

The Pacific Telephone and Telegraph Company
South Central Bell Telephone Company
Southern Bell Telephone and Telegraph Company
The Southern New England Telephone Company
Southwestern Bell Telephone Company
Wisconsin Telephone Company
United States Independent Telephone Association (USITA)
RCA GLOBAL COMMUNICATIONS, INC.,
Intervenors

ON PETITION FOR REVIEW OF DECISION
OF FEDERAL COMMUNICATIONS COMMISSION

Present: HASTIE, WEIS and GARTH, *Circuit Judges*

Judgment

This cause came on to be heard on the record from the Federal Communications Commission and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that order No. 19896 of the Federal Communications Commission dated April 23, 1974 be, and the same is hereby affirmed. Costs taxed against petitioners.

ATTEST:

THOMAS F. QUINN
Clerk

September 11, 1974

Certified as a true copy and issued in lieu of a formal mandate on November 7, 1974.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX D

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1386

THE BELL TELEPHONE CO. OF PENNSYLVANIA, ET AL.
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.
Respondents

MCI TELECOMMUNICATIONS CORP., ET AL.
Intervenors

SUR PETITION FOR REHEARING

Present: HASTIE, ALDISERT, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by The Bell Telephone Co. of Pennsylvania in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

[Illegible]
Judge

Dated: October 30, 1974

APPENDIX E

APPENDIX E

Specified Provisions of the Communications Act of 1934

Section 201, 47 U.S.C. § 201, provides:

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided,* That communications by wire or radio, subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further,* That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further,* That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such

rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

Section 202, 47 U.S.C. § 202, provides:

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable perference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense.

Section 203, 47 U.S.C. § 203, provides:

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and

be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

Section 204, 47 U.S.C. § 204, provides:

Whenever there is filed with the Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspensions, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increase charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall

give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 205, 47 U.S.C. §205, provides:

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

Section 211, 47 U.S.C. § 211, provides:

(a) Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation

to any traffic affected by the provisions of this chapter to which it may be a party.

(b) The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine.

Specified Provisions of the Interstate Commerce Act

Section 6(1), 49 U.S.C. § 6(1), provides:

Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and

can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

Section 6(3), 49 U.S.C. § 6(3), provides:

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule than in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* That the Commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public record.

Section 6(5), 49 U.S.C. § 6(5), provides:

Every common carrier subject to this chapter shall also file with said Commission copies of all contracts, agreements, or arrangements, with other common carriers in relation to any traffic affected by the provisions of this chapter to which it may be a party: *Provided, however,* That the Commission, by regulations, may provide for exceptions from the requirements of this paragraph in the

case of any class or classes of contracts, agreements, or arrangements, the filing of which, in its opinion, is not necessary in the public interest.

Section 6(7), 49 U.S.C. § 6(7), provides:

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 13(1), 49 U.S.C. § 13(1), provides:

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law

hus complained of. If such carrier or carriers shall not atisfy the complaint within the time specified, or there hall appear to be any reasonable ground for investigating aid complaint, it shall be the duty of the Commission to nvestigate the matters complained of in such manner and y such means as it shall deem proper.

ection 13(4), 49 U.S.C. § 13(4), provides:

Whenever in any such investigation the Commission, fter full hearing, finds that any such rate, fare, charge, lassification, regulation, or practice causes any undue or nreasonable advantage, preference, or prejudice as be-ween persons or localities in intrastate commerce on the ne hand and interstate or foreign commerce on the other and, or any undue, unreasonable, or unjust discrimina-ion against, or undue burden on, interstate or foreign ommerce (which the Commission may find without a sepa-ation of interstate and intrastate property, revenues, and xpenses, and without considering in totality the opera-ions or results thereof of any carrier or group or groups f carriers wholly within any State), which is hereby for-idden and declared to be unlawful, it shall prescribe the ate, fare, or charge, or the maximum, or minimum, or naximum and minimum, thereafter to be charged, and the lassification, regulation, or practice thereafter to be ob-erved, in such manner as in its judgment, will remove uch advantage, preference, prejudice, discrimination, or urden: *Provided,* That upon the filing of any petition uthorized by the provisions of paragraph (3) of this sec-ion to be filed by the carrier concerned, the Commission hall forthwith institute an investigation as aforesaid into he lawfulness of such rate, fare, charge, classification, egulation, or practice (whether or not theretofore con-idered by any State agency or authority and without re-ard to the pendency before any State agency or authority f any proceeding relating thereto) and shall give special xpedition to the hearing and decision therein. Such rates, ares, charges, classifications, regulations, and practices hall be observed while in effect by the carriers parties to uch proceeding affected thereby, the law of any State or

the decision or order of any State authority to the contrary notwithstanding.

Section 15(1), 49 U.S.C. § 15(1), provides:

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

Section 15(3), 49 U.S.C. § 15(3), provides:

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by raiload subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

Section 15(7), 49 U.S.C. § 15(7), provides:

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such

rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Specified Provisions of the Natural Gas Act

Section 4, 15 U.S.C. § 717c, provides:

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good

cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect, and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or

charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5, 15 U.S.C. § 717d, provides:

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

APPENDIX F

APPENDIX F

Excerpts from Brief of Respondents Federal Communications Commission and the United States in Washington Utilities and Transportation Commission v. FCC, and National Association of Regulatory Utility Commissioners, Nos. 71-2919 and 72-1198, 9th Cir., Jan. 20, 1975.

"Many applicants, such as intervenors MCI, Southern Pacific, Interdata, etc., sought permission to construct point-to-point microwave facilities solely for the provision of private line communication services. It was made clear that their facilities would not be connected with the interstate telephone network of AT&T, although many applicants would require connection with local telephone companies in order to obtain local distribution (*i.e.* from the microwave terminal to a customer's premises). Subscribers would pay a monthly rate for an open line between a limited number of points, and would be able to communicate only with certain specified locations." [Excerpt from pp. 8-9]

* * *

"The new specialized companies are offering business and institutional users a choice of diverse services of stated quality (either higher or lower than that of the telephone company) that is solely for the purpose of meeting the needs of users for specialized communications between or among a given number of points. Thus, it is not necessary to the usefulness of the proposed systems that they be interconnected with the interstate public telephone system of AT&T.[16] [Excerpt from p. 43]

---

[16] It will be necessary in many instances for specialized carriers to obtain 'local loop' interconnection (i.e. a private line from a microwave terminal in a city to the customer's premises) with the local telephone company. However on the basis of comments submitted to the Commission in this proceedings, such interconnection is not expected to create any substantial equipment problems. And, in fact, the one specialized carrier now in operation, MCI, is successfully so interconnected with Bell System telephone com-

panies in Chicago and St. Louis.

Additionally, all of the technical aspects of interconnection (Issue E) were not resolved in the First Report and Order, R. 3311-3312. A Further Notice of Inquiry and Proposed Rule Making was issued on this an another issue on June 21, 1971 (R-3437), and is now pending before the Commission."

No. 74-1229

MAY 16 1975

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

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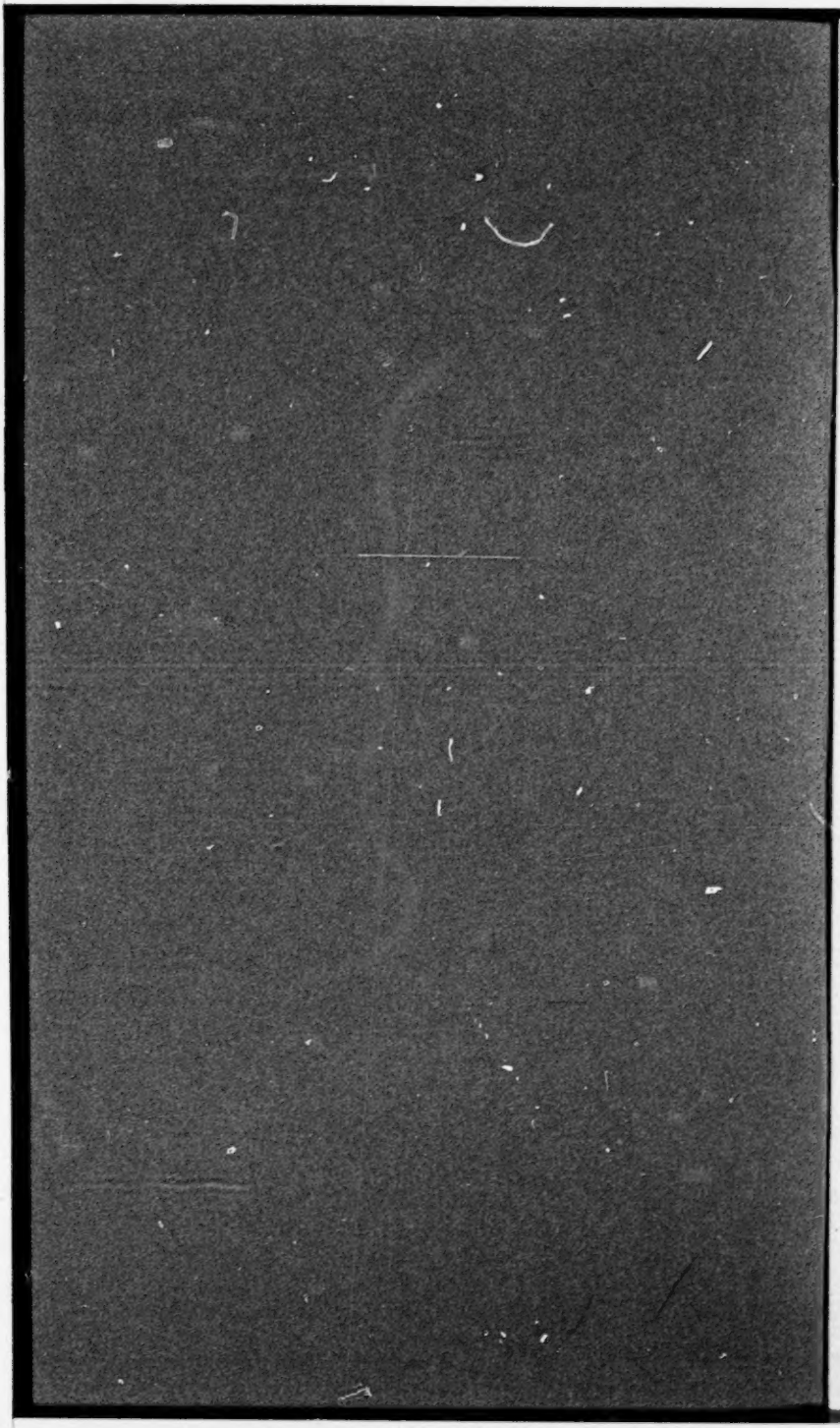

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1229

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v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

The Southern Pacific Communications Company ("Southern Pacific"), a party intervenor to the proceedings in the United States Court of Appeals for the Third Circuit whose judgment is sought to be reviewed, respectfully submits this brief in opposition to the peti-

tion of American Telephone and Telegraph Company ("AT&T") et al. ("the Bell System") for a writ of certiorari in the above-entitled proceeding.

OPINIONS BELOW

The decision of the Federal Communications Commission ("the Commission") is reported at 46 F.C.C.2d 413 (1974), and appears as petitioners' Appendix B (Pet. App. B). The opinion of the United States Court of Appeals for the Third Circuit is reported at 503 F.2d 1250 (1974), and appears as petitioners' Appendix A (Pet. App. A).

JURISDICTION

The judgment of the Court of Appeals (Pet. App. C) was entered on September 11, 1974, and an order denying a petition for rehearing (Pet. App. D) was entered on October 30, 1974. The petition for a writ of certiorari was filed on March 28, 1975. The time for all non-Federal respondents to file a response to the petition was extended by the Clerk to and including May 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

In addition to provisions of statutes set forth in the Appendix (Pet. App. E), this case also involves Sections 4(i) and 4(j) of the Communication Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), which provide in pertinent part:

> (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

> (j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * *

and Section 4 of the Administrative Procedure Act, as recodified, 5 U.S.C. § 553, which provides in pertinent part:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> * * * * *
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. * * *

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Commission afforded petitioners the "opportunity for hearing" under Section 201(a) of the Communications Act of 1934, as amended,[1] in

[1] 47 U.S.C. § 201(a).

ordering the Bell System to furnish interconnection facilities to specialized carriers essential to the rendition of their authorized communications services, and gave adequate notice of the nature of the interconnection required, where

(a) in an evidentiary adjudicatory hearing, the Commission found that insufficient evidence had been offered by the Bell System "to support a conclusion that the proposed interconnection is not feasible";[2]

(b) in a rule making proceeding, the Commission declared it unnecessary to elaborate on interconnection requirements because the Bell System had represented it was prepared to work cooperatively to furnish any connections that might be required;[3]

(c) in an exchange of correspondence, the Commission Chairman, at the direction of the Commission, advised the Bell System that it was required to file tariffs to provide interconnection facilities "essential to the rendition by the specialized carriers of all their authorized services";[4] and

(d) in a show cause proceeding, the Commission found, on the basis of pleadings, briefs, reply

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[2] *Microwave Communications, Inc.*, 18 F.C.C.2d 953, 965 (1969), reconsideration denied, 21 F.C.C.2d 190 (1970), modifications granted, 27 F.C.C.2d 380 (1971).

[3] *Specialized Common Carrier Inquiry*, 24 F.C.C.2d 318 (1970), 29 F.C.C.2d 870, 940 (1971), reconsideration denied, 31 F.C.C.2d 1106 (1971), affirmed sub nom. *Washington Utilities & Transportation Commission* v. *FCC*, No. 71-2919 (9th Cir. Jan. 20, 1975).

[4] See *Bell Tel. Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250, 1257 (1974) (Pet.App. A, 13a).

briefs, and oral argument, that the Bell System had failed to come forward with specific factual allegations and engineering or other supporting statements to demonstrate that there are significant unresolved factual questions which require a hearing, and that the issuance of the broad interconnection orders was required in order to serve the public interest by competition among communications common carriers on a fair and non-discriminatory basis.[5]

2. Whether petitioners could lawfully unilaterally abrogate binding contracts with The Western Union Telegraph Company by filing tariffs with the Commission.

STATEMENT OF THE CASE

In 1969, after an evidentiary hearing commenced six years earlier, the Commission authorized a new common carrier to provide specialized communications carrier private line service between St. Louis and Chicago in competition with the Bell System.[6] The Commission made clear that it expected the existing carriers, including petitioners, to provide local loop interconnection to the new specialized carrier, absent a significant showing it is not technically feasible.[7] After several other new carriers also filed applications to provide specialized communications service, the Com-

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[5] *Bell System Tariff Offerings*, 44 F.C.C.2d 245 (1973), 46 F.C.C. 2d 413, 426-428 (1974) (Pet.App. 25b-27b), affirmed sub nom. *Bell Tel. Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (1974) (Pet. App. A).

[6] Note 2 *supra*.

[7] Id., 18 F.C.C.2d at 965, 21 F.C.C.2d at 193.

mission instituted a rule making proceeding to determine whether the public interest would be served by permitting new carriers to compete in the field of specialized communications service.[8] In its notice of inquiry, the Commission emphasized that it expected an established carrier to provide interconnection where it has monopoly control over essential facilities, and requested comments on the methods of providing local distribution.[9] At the conclusion of the proceeding, the Commission reaffirmed its view that "established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions", but found it unnecessary to elaborate upon their obligations because of its reliance upon the representations of cooperation from petitioners and other telephone companies.[10]

Following complaints that the Bell System companies were not providing prompt and effective interconnection to specialized carriers, and an exchange of correspondence, the Commission Chairman by direction of the Commission advised the Bell System to file tariff schedules which "will provide the interconnection facilities essential to the rendition by the specialized carriers of all their authorized services on terms and conditions which are just, reasonable, and non-discriminatory."[11]

After further disputes among the new and established carriers, the Commission issued an order to show cause to the Bell System, received briefs and reply briefs,

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[8] Note 3 *supra*.

[9] Id., 24 F.C.C.2d at 347.

[10] Id., 29 F.C.C.2d at 940.

[11] See Note 4 *supra*, 503 F.2d at 1257 (Pet.App. 13a).

and heard oral argument from numerous parties, including argument in the nature of testimony from the President of AT&T's Long Lines Department alleging harm to the network and the public, before issuing the decision which is the subject of the petition for a writ of certiorari before this Court. Included in the Commission's inquiry were questions whether the Commission had previously ordered the Bell System to provide physcial connection of specialized carrier facilities to two particular elements of private line service known as Foreign Exchange service (FX) and Common Control Switching Arrangements (CCSA), and if not whether it should be ordered to do so.[12] The Commission, after reciting the course of events and the various considerations which led to its conclusions, held that its prior orders covered interconnection for the broad range of services which specialized carriers are authorized to provide, including FX and CCSA, and that in any event the Commission had again reviewed the question of interconnection, given careful consideration to the briefs and oral argument of the Bell System, and again concluded that the public interest requires that Bell provide interconnection facilities for all of the authorized facilities of the specialized carriers, including FX and CCSA.[13]

The Commission also held that the Bell System cannot supersede, modify, or terminate the contracts for the exchange of facilities with The Western Union Telegraph Company (Western Union) terminable in their terms only upon the giving of five years' written

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[12] Note 5 *supra*, 44 F.C.C.2d at 251-252.

[13] Id., 46 F.C.C.2d at 417-427 (Pet.App. 9b-26b).

notice, merely by filing tariffs or taking other unilateral action.[14]

The United States Court of Appeals for the Third Circuit affirmed these rulings of the Commission. The petition for a writ of certiorari seeks review of these rulings.

ARGUMENT

1. It is now a well settled principle of statutory construction, contrary to the position of petitioners, that an evidentiary trial-type hearing is not an essential prerequisite where the statute requires, as under Section 201(a) of the Communications Act of 1934, as amended,[15] only an "opportunity for hearing". Since the *Second Chenery* case,[16] it has been a matter of agency discretion whether policy shall be enunciated by ad hoc decisions in adjudicatory cases upon an evidentiary record, or by general inquiry and rule making proceedings. Circuit Judge Henry J. Friendly in 1970 recognized that the "trend of judicial decision has been to extend the agencies' power to handle their problems by rule making."[17] More recently, Circuit Judge J. Skelley Wright has observed that administrative law has entered "an age of rulemaking", and that especially in rapidly expanding realms such as economic regulation, "the policy disputes are too sharp, the technological considerations too complex, the interests affected too numerous, and the missions too urgent for

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[14] Id., 46 F.C.C.2d at 430-435 (Pet.App. 32b-40b).

[15] 47 U.S.C. § 201(a).

[16] *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).

[17] *Long Island Railroad Co.* v. *United States*, 318 F.Supp. 490, 496 (D.C.N.Y. 1970).

agencies to rely on the ponderous workings of adjudication." [18]

This Court held in 1972 in *Allegheny-Ludlum* [19] that the adjudicatory provisions of the Administrative Procedure Act [20] need be applied only where the agency statute, in addition to providing for a hearing, prescribes explicitly that it be "on the record", or words of similar import. The issue now sought to be raised by petitioners was definitively settled in the *Florida East Coast* case,[21] where this Court held that the term "hearing" may be satisfied by adherence to the rule making requirements of Section 4 of the Administrative Procedure Act,[22] and does not by its own force require the Commission to hear oral testimony, to permit cross-examination, or (as it did in the proceeding below) to hear oral argument.

Thus, for the reasons stated in its opinion, the Court below correctly held that the statutory provision of an "opportunity for hearing" does not per se require an evidentiary hearing; that an evidentiary hearing was not required in the circumstances of this individual case before the Commission; and, as the Commission also held within its expertise, that the factual issues alleged by petitioners did not require an evidentiary hearing.[23]

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[18] Wright, "The Courts and the Rulemaking Process: The Limits of Judicial Review," 59 Cornell Law Rev. 375, 376 (1974).

[19] *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972).

[20] 5 U.S.C. § 554.

[21] *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224, 240 (1973).

[22] 5 U.S.C. § 553.

[23] Note 4 *supra*, 503 F.2d at 1264-1268 (Pet.App. 28a-36a).

In a related case upholding the Commission's policy in favor of the entry of new carriers in the specialized communications field, the Ninth Circuit has also recently held that rule making proceedings rather than adjudicative hearings on individual applications were appropriate to resolve the issues.[24]

2. There is no conflict or division among the Courts of Appeals on the issue when an evidentiary hearing is required, as the Third Circuit's decision itself makes clear in declining to follow a line of cases where evidentiary hearings were found necessary.[25] These very cases, inter alia, are cited by the Third Circuit for the rule that "it is well settled that there is no need for an evidentiary hearing when [it is found, as here] there is no material factual dispute involved."[26]

3. There is no dispute among the Circuits with the *principle* of the *Second Morgan* case[27] that an administrative hearing must include a reasonable opportunity to know the claims of the opposing party and what the Government proposes. The only question here is its *application* to the circumstances of this case. Whatever uncertainty may be alleged to have existed previously (and both the Commission and the Court below ruled that the full scope of interconnection was fairly

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[24] *Washington Utilities & Transportation Commission* v. *FCC*, note 3 *supra*.

[25] Citing *Appalachian Power Co.* v. *Environmental Protection Agency*, 477 F.2d 495, 501 (4th Cir. 1973); *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission*, 420 F.2d 577, 585-586 n. 22, 589 n. 36 (D.C.Cir. 1969); *Citizens for Allegan County* v. *FPC*, 414 F.2d 1125, 1128-1129 (D.C. Cir. 1969).

[26] Note 4 *supra*, 503 F.2d at 1267 fn. 25 (Pet.App. 34a fn. 25).

[27] *Morgan* v. *United States*, 304 U.S. 1, 18-19 (1938).

encompassed in the Commission's prior orders), certainly the issue was crystallized in the notice of inquiry in the proceeding here under review, ordering the parties to address themselves to the questions whether, inter alia, the Commission had theretofore ordered the telephone companies to provide interconnection or whether such interconnection is otherwise required; if so, the scope of the order or rule, with particular reference to FX and CCSA interconnection; and, if not, whether such interconnection should be ordered.[28]

4. The contracts with Western Union which petitioners seek to abrogate by tariff will remain in effect only until September 28, 1978, because of a notice of termination, and it appears undisputed that they will not be renewed at that time. The issue sought to be raised by petitioners is thus of very limited precedential value. Contrary to the position of petitioners, the Court below has ruled that cases claimed by petitioners to be in conflict are distinguishable, and that the issue properly raised only required a determination of which precedent was the appropriate model to resolve the controversy between petitioners and Western Union.[29]

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[28] Note 5 *supra*, 24 F.C.C.2d at 251-252.

[29] Note 4 *supra*, 503 F.2d at 1274-1276 (Pet.App. 48a-51a).

CONCLUSION

The petition for a writ of certiorari should be denied.

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May 16, 1975

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1229

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT MCI TELECOMMUNICATIONS CORPORATION IN OPPOSITION

Respondent MCI Telecommunications Corporation ("MCI")[1] hereby submits its brief in opposition to

[1] Both MCI Telecommunications Corporation and its sister subsidiary, MCI-New York West, Inc., participated fully in the proceedings below. MCI-New York West, Inc., however, has been recently merged into MCI Telecommunications Corporation. "MCI" is utilized throughout this brief to describe either MCI Telecommunications Corporation or the MCI group of affiliated companies.

the petition of American Telephone and Telegraph Company, et al., for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit.

QUESTIONS PRESENTED

1. Was the court below correct in upholding the decision of the Federal Communications Commission ("FCC" or "the Commission") requiring the telephone companies to provide local distribution facilities for the specialized common carriers? The FCC's decision concluded that proceeding by rule making rather than by *ad hoc* adjudication in the promulgation and implementation of its policy complied with the requirement of Section 201(a) (47 U.S.C. § 201(a)) of the Communications Act that petitioners be accorded an opportunity for hearing.

2. Was the court below correct in upholding the FCC's decision that its proceedings which led to the adoption of the interconnection orders afforded petitioners adequate notice of the nature of the interconnection required?

3. Was the court below correct in upholding the FCC's action in rejecting petitioners' local distribution tariffs, which attempted to abrogate unilaterally existing contracts between petitioners and Western Union?[2]

COUNTERSTATEMENT OF THE CASE

This case concerns the challenge by petitioners, American Telephone and Telegraph Company and a

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[2] Respondent MCI relies on the briefs of respondents Federal Communications Commission and Western Union Telegraph Company on this point.

number of telephone operating companies of the Bell System, to a cease and desist order of the Federal Communications Commission requiring the American Telephone and Telegraph Company and affiliated Bell System Companies (hereinafter "AT&T") to provide certain communications services and facilities to respondent MCI and to other communications common carriers and prohibiting petitioners from engaging in certain discriminatory practices. This order was the culmination of long and protracted proceedings before the Federal Communications Commission in which AT&T fully participated and as a result of which the FCC concluded that competition in the private line communications field would be in the public interest.[3] Private line services are generally sold to high volume communications users such as business and government organizations. Such users are provided with private circuits for the transmission of communications between termination points specified by the customer. The service gives the customer continuous communication between these specified points without requiring the establishment of a new connection for each call or message.[4]

From the outset it has been recognized that achievement of "end-to-end" customer service in connection with intercity services and facilities offered by MCI

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[3] See *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), *reconsid. denied*, 21 FCC 2d 190 (1970); *Specialized Common Carrier Services* (Docket No. 18920), 29 FCC 2d 870, *reconsid. denied*, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Utilities and Transportation Comm'n* v. *FCC*, Nos. 71-2919 and 72-1198 (9th Cir. Jan. 20, 1975), *rehearing denied*, March 12, 1975.

[4] See 503 F.2d at 1254, n. 3 (Petitioners' Appendix ("Pet. App.") 7a, n.3).

and other specialized carriers would require termination by interconnection with the communications facilities or services of other existing common carriers, the local telephone companies. Although MCI's network is currently providing communications services to over 500 customers located in 29 cities in the United States, the MCI network does not extend to its customers' premises or other termination points but instead stops at MCI's city terminals. With minor exceptions, MCI must, therefore, rely upon AT&T affiliates to provide local interconnection, the communication bridge between MCI's city terminals and its customers' termination points. By virtue of the FCC's decision, AT&T affiliates are today providing MCI and others with these required local interconnections. Continued provision of local interconnection is absolutely necessary to the economic viability of MCI and the other specialized common carriers. Accordingly, the Commission has many times enunciated its policy that the established carriers having such local distribution facilities should upon request permit interconnection or leased channel arrangements with specialized carriers on reasonable terms and conditions, and that, in instances where a carrier has monopoly control over essential facilities, no discrimination would be countenanced in favor of an affiliated carrier nor would favoritism among competitors be permitted. The Commission has also made it clear that the obligation to interconnect requires the telephone companies to provide the facilities or services essential to the rendition by MCI and other specialized carriers of all their authorized interstate communications services.

Two particular categories of private line service are specifically in issue in this case, the Foreign Ex-

change Service (FX) and Common Control Switching Arrangements (CCSA).[5] FX and CCSA are clearly private line services; they are so classified by AT&T itself.[6] What petitioners allege is that the FCC's order requiring AT&T to provide the interconnections necessary for the delivery of FX and CCSA services and which directs AT&T to cease and desist from practices which delay interconnection and deny services to the specialized carriers on a par with AT&T's own private line service division, the Long Lines Department, is defective on a number of procedural and substantive grounds. However, after a full and complete

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[5] "FX" and CCSA" are defined by the Federal Communications Commission as follows:

> "Foreign Exchange (FX) is a private line service that is partially 'switched'. It allows a businessman located in one state to, in effect, maintain a local phone in another state. Under FX, for example, a businessman in Washington can be reached by telephone subscribers in New York City and can himself reach New York City telephone subscribers (through a local loop in Washington, a Washington-New York interchange line, and a business line in the New York City exchange area). However, New York City telephone subscribers could not reach Washington subscribers other than the Washington businessman over FX private line service and the latter would have to maintain a separate telephone in order to tie into the Washington exchange area.
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> "A Common Control Switching Arrangement (CCSA) is a private line system for linking the various offices of a large company through large switches on a local telephone company's premises instead of through PBX switches on the customer's premises. The private line circuits furnished in CCSA are provided for the exclusive use of the CCSA customer. However, the switching machines are shared with other private line service customers."

In the Matter of Bell System Tariff Offerings, 46 FCC 2d at 418, n.5 (Pet. App. 9b-10b, n.5).

[6] 46 FCC 2d at 425 (Pet. App. 22b).

analysis and review of petitioners' contentions, both the FCC and the lower court held that the order was in compliance with all applicable statutory, administrative law, and constitutional requirements.

As will be set forth in more detail below, the petition for writ of certiorari is bottomed on a fundamental mischaracterization of the various proceedings leading up to the issuance of the cease and desist order as unrelated fragmentized proceedings, rather than a logical progression designed initially to make policy and later to enforce it. Both the FCC and the court below found to the contrary and the lower court held that the cease and desist order was "a device for enforcing previously articulated responsibilities, and not . . . an independent proceeding."[7] Once this proposition is understood, the legal issues involved in this case become clear.

A. The FCC Proceedings

1. *The MCI Case.* The Commission first considered the provision of private line services by specialized common carriers in *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), *reconsid. denied,* 21 FCC 2d 190 (1970). MCI proposed to offer its subscribers a specialized common carrier microwave service between Chicago, Illinois and St. Louis, Missouri via nine intermediate points "making it incumbent upon each subscriber to supply his own communications link between MCI's sites and his place of business (loop service)." (*Id.* at 953-54). The applications were designated for an evidentiary hearing in which MCI participated, as did a number of existing carriers opposed to the institution of competitive new service, including AT&T and the operating Bell System Companies in the terri-

[7] 503 F.2d at 1263 (Pet. App. 26a).

tories involved. In arriving at its determination that the service proposed by MCI was in the public interest, the Commission noted that MCI's ability to market its services was dependent upon the ability of its subscribers to secure interconnection service from the local telephone companies serving the terminal areas. Nothing the carriers' professed "intransigence" on this score, the FCC declared:

> "Since [the existing carriers] have indicated that they will not voluntarily provide loop service we shall retain jurisdiction of this proceeding in order to enable MCI to obtain from the Commission a prompt determination on the matter of interconnection. Thus, at such time as MCI has customers and the facts and details of the customers' requirements are known, MCI may come directly to the Commission with a request for an order of interconnection. We have already concluded that a grant of MCI's proposal is in the public interest. *We likewise conclude that, absent a significant showing that interconnection is not technically feasible, the issuance of an order requiring the carriers to provide loop service is in the public interest.*" (emphasis added)

18 FCC 2d at 965.

2. *The Docket No. 18920 Proceeding.* Grant of the initial MCI applications triggered the submission of a large number of specialized common carrier applications—by MCI and by other applicants. Because the applications raised certain common questions, the Commission instituted a proceeding entitled *Notice of Inquiry to Formulate Policy, Notice of Proposed Rule Making, and Order in Docket No. 18920,* 24 FCC 2d 318 (1970), looking towards the formulation of appropriate policies with respect to the matters set forth

in the Notice. The proceeding was instituted under the provisions, *inter alia,* of Sections 4(i), 201 and 303 of the Communications Act of 1934, as amended (47 U.S.C. §§ 154(i), 201 and 303). In the Notice the Commission specified five separate issues, the two relevant to this case being (24 FCC 2d at 327):

> "A. Whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field; and, if so,
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> * * * * *
>
> "E. What is the appropriate means for local distribution of the proposed services?"

The Commission's Notice set forth a detailed analysis by its staff of basic legal and economic considerations involved, including tentative conclusions to be derived therefrom. Voluminous comments were filed by the specialized common carrier applicants, AT&T and its operating companies, independent telephone companies, other carriers, scores of businesses and business associations and other interested parties (see 29 FCC 2d at 945-980). All of the parties were also given an opportunity to present their views and arguments at a lengthy oral argument. After such submissions the Commission issued a detailed *First Report and Order,* 29 FCC 2d 870 (1971). The Commission concluded as to Issue A (29 FCC 2d 920):

> "In light of all the foregoing and the record as a whole, we adopt our staff's analysis of Issue A, as amplified and modified herein. We find that: there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there

are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweight the considerations supporting new entry. We further find and conclude that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity."

So far as Issue E is concerned, no substantive material was presented by the existing carriers as to their earlier claims that interconnection was not technically feasible.[8] The Commission concluded as to Issue E (29 FCC 2d at 940):

"We reaffirm the view expressed in the *Notice* (paragraph 67) that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier. Moreover, as there stated, 'where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors'. In view of the representations of AT&T and GT&E in this

[8] In the order designating Docket No. 18920 for oral argument the Commission requested the parties "to address the question of what, if any, specific information would be adduced in any evidentiary hearing which is of material importance and has not been, or could not have been, filed in the record of this proceeding." 29 FCC 2d at 917. No such material or comments were filed by AT&T on Issue E.

proceeding,[9] upon which we rely, and the self-interest of other independent telephone companies in not losing potential new business, there appears to be no need to say more on this question at this time. Should any future problem arise, we will act expeditiously to take such measures as are necessary and appropriate in the public interest to implement and enforce the policies and objectives of this Decision." (footnote omitted)

The Commission thereafter terminated the proceeding as far as Issue A and other issues were concerned, but expressly retained full jurisdiction over Issue E (29 FCC 2d at 942).[10]

3. *The Commission's October 4, 1974 Letter Order.* For a two year period following the decision in Docket No. 18920, MCI, in reliance on that decision and on the interconnection representations of the existing carriers, built its original Chicago-St. Louis System, expanded its system significantly at substantial cost, and conducted extensive negotiations with the Bell companies for interconnection. In the summer of 1973, there was a developing consensus between AT&T and

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[9] The AT&T representations referred to are as follows (29 FCC 2d at 939):

"When the Commission determines that it is in the public interest to license additional intercity common carriers, we would be willing to discuss with them the technical arrangements required and appropriate charges for *any* connections required of the telephone companies." (emphasis added)

GT&E represented that with adequate lead time it too would provide local distribution services to any authorized carrier.

[10] Petitioners did not appeal the Commission's decision in Docket No. 18920. An appeal from the decision to the Ninth Circuit by other parties resulted in an order affirming the Commission's decision, see n.3, *supra*.

MCI as to a working agreement and AT&T even signed interim interconnection agreements with MCI. However, shortly before Labor Day, 1973 Bell's whole attitude toward interconnection changed and its earlier "intransigence" reappeared. It unilaterally broke off negotiations for final interconnection agreements (see A. 9-11;[11] see also 369 F. Supp. 1004 at 1010 (E. D. Pa. 1974)). There then followed an exchange of letters among the Commission, MCI and AT&T concerning MCI's requests for interconnection and the frustrations it had experienced at AT&T's hands in obtaining interconnection. The culmination of the exchange of correspondence was a "By Direction of the Commission" letter from the Chairman of the Commission to AT&T dated October 4, 1973 (A. 28). In this letter order the Commission reaffirmed its earlier *MCI* and Docket No. 18920 rulings requiring the telephone companies to provide interconnection to specialized carriers. The Commission's order stated (A. 30):

> "[E]ffective implementation of our policy objectives and the statutory scheme of the Communications Act require that you promptly file tariff schedules with this Commission in accordance with Section 203 of the Communications Act which tariff schedules will provide the interconnection facilities essential to the rendition by the specialized carriers of all their authorized services on terms and conditions which are just, reasonable and non-discriminatory. Until such tariffs are filed and effective, there should be no delay in honoring requests of specialized carriers for interconnection facilities required by such carriers to terminate the services they are authorized by the

[11] References to "A" are to the Appendix in the lower court which has been lodged by petitioners with the Clerk of this Court. See Pet. Brief p. 5, n.6.

Commission to furnish. Such facilities can be provided under contract on an interim basis and we assume that this will be done." [12]

4. *The Docket No. 19896 Proceeding.* Finally, on December 13, 1973 the Commission issued a *Memorandum Opinion and Order to Show Cause in Docket No. 19896* (A. 130). It described the various complaints of the specialized carriers and referred to the earlier proceedings in *MCI* and *Specialized Common Carrier Services, inter alia,* requiring interconnection by the telephone companies with MCI and other specialized common carriers. It concluded that, on the record before the Commission, there were no material disputed facts and thus no necessity for holding an evidentiary hearing.

The Commission directed the parties to file briefs and participate in oral argument on four issues as follows (A. 140):

"[W]hether (1) the Commission has heretofore ordered the telephone companies, pursuant to Sec-

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[12] Subsequent to the October 4, 1973 letter order, MCI commenced an action in the Eastern District of Pennsylvania pursuant to 47 U.S.C. § 406 to compel AT&T to provide FX, CCSA and other related services. While this action was pending the Commission instituted the show cause proceeding described *infra.* Prior to the Commission's decision in the show cause proceeding, the district court issued an extensive memorandum opinion upholding MCI's contentions and ordering AT&T, to interconnect. *MCI Communications Corp.* v. *AT&T,* 369 F. Supp. 1004 (E.D. Pa. 1974). On appeal, strictly as a matter of primary jurisdiction (see 503 F. 2d at 1263, Pet. App. 25a-26a), the United States Court of Appeals for the Third Circuit vacated the district court's injunction and returned to the FCC the responsibility for clarifying AT&T's duties to the specialized common carriers. See *MCI Communications Corp.* v. *AT&T,* 496 F.2d 214 (3rd Cir. 1974).

tion 201(a) of the Communications Act, to provide interconnection with MCI or whether such interconnection is otherwise required pursuant to rule or regulation within the meaning of Section 312 of the Act; (2) if so, (a) the scope of that order or rule or regulation with particular reference to interconnection for FX and CCSA services of MCI; (b) whether the telephone companies have complied with such order, rule or regulation and, (c) if they have not complied, the appropriate remedy, whether under Section 312 of the Act or otherwise; (3) if interconnection has not hitherto been ordered or required by rule or regulation whether it should be and, if so, upon what terms and conditions; and (4) whether the Commission should affirm, reverse or modify the Staff action of October 19, 1973 for which review is here requested."

Briefs and other written material were submitted by MCI, petitioners, and others, and they participated in a full day of oral presentation before the Commission *en banc*. The Commission thereafter issued the decision here in question (Pet. App. B) in which it discussed all of the contentions of the parties, described the prior proceedings, and pointed out that petitioners and other carriers have been accorded an "opportunity for hearing" on the interconnection issue in the *MCI* proceeding—where a decision was made with respect to interconnection, even though no order for interconnection was issued—and in the *Specialized Common Carrier Services* rule making proceeding in Docket No. 18920. The Commission specifically pointed out that the inquiry in Docket No. 18920 included an issue as to the appropriate means of local distribution for specialized carriers for their proposed services. The Commission noted, on the basis of the showing in the

proceedings to date, that adequate grounds existed for issuance of the interconnection order under Section 201(a) and stated that it did not find the existence of material factual disputes which would require an adjudicatory hearing. The Commission concluded (46 FCC 2d at 423, Pet. App. 19b):

> "[I]n view of the Commission decision in *MCI* and the policy determinations and conclusions set forth in the *Specialized Common Carrier Services* proceeding, we find that our previous orders were broad enough to require the telephone companies to provide interconnection facilities for MCI and other specialized carriers on a non-discriminatory basis for all services provided to an affiliated or other carrier in competition with the authorized services of the new specialized carriers absent a significant showing that such interconnection is not technically feasible."

The Commission then addressed itself to the contentions of petitioners that prior Commission orders did not mention FX and CCSA services and consequently did not encompass interconnection facilities for such purposes. The Commission had two answers. First, it pointed out in detail the basis for its determination that its "prior orders covered interconnection for the broad range of services which the specialized carriers are authorized to provide and that Bell has been directed to furnish interconnection facilities for the purpose of enabling MCI and the other specialized carriers to provide all such services, including FX and CCSA type services." (46 FCC 2d at 426-27, Pet. App. 25b) Second, the Commission proceeded anew to consider the argument advanced by petitioners in the Docket No. 19896 proceeding that substantial and significant differences existed between interconnections

for FX and CCSA and interconnections for other private line services. The Commission analyzed the petitioners' material in detail and found that no basis existed for the argument. Accordingly, after specifically finding that AT&T had discriminated against MCI and the other specialized carriers by denying them the interconnection privilege provided to AT&T's own Long Lines Department, the Commission issued the order involved here requiring AT&T to provide FX and CCSA services to the specialized carriers on a nondiscriminatory basis.[13]

B. The Court Proceeding

There then followed petitioners' appeal in the United States Court of Appeals for the Third Circuit. The court below affirmed the Commission's decision in all respects (Pet. App. A).

ARGUMENT

This case presents no important or unresolved issues requiring action by this Court. It involves a proceeding where petitioners were accorded the full panoply of rights required by the statute involved and by decisions of this Court. AT&T's argument that it was entitled to an evidentiary hearing is refuted by such decisions of this Court as *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), *FPC* v. *Texaco Inc.*, 377 U.S. 33 (1964), *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224 (1973), and *United States*

[13] The Commission as part of its decision in Docket No. 19896 also adopted an order rejecting the tariffs filed by the Bell System Companies to the extent that the tariffs related to facilities and services covered by the Bell-Western Union exchange of facilities contracts (46 FCC 2d at 436-37, Pet. App. 42b-43b). See n.2, *supra*.

v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). AT&T's argument that it was denied adequate notice of the FCC's action requiring interconnection is a narrow question of whether in fact AT&T was adequately provided with such notice, a question clearly resolved against AT&T both by the FCC and by the court below.

It is central to an understanding of this case to realize that although the petition for writ of certiorari technically concerns the FCC's decision in Docket No. 19896, the FCC and the court below specifically found that the show cause proceeding which resulted in that decision cannot be isolated from the series of prior proceedings set forth above. The orders contained in the Commission's decision involved principles, policies and directives regarding interconnection which had been set forth and developed in three interrelated proceedings: The initial decision in *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), *reconsid. denied*, 21 FCC 2d 190 (1970), the *Specialized Common Carrier Services* decision in Docket No. 18920, 29 FCC 2d 870, *reconsid. denied*, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Utilities and Transportation Comm'n.* v. *FCC*, Nos. 71-2919 and 72-1198 (9th Cir., Jan. 20, 1975), *rehearing denied*, March 12, 1975, and, finally the decision in Docket No. 19896 itself, which is the one involved here. Throughout the petition, AT&T attempts to segment these proceedings by picking and choosing, quoting and analyzing from one or another decision, while conveniently ignoring other relevant parts of the course of proceedings employed by the FCC in directing interconnection and then enforcing compliance with its orders. When the entire course of the proceedings is analyzed, it becomes clear that the Commission has accorded to the affected par-

ties notice of the breadth of interconnection requirements it intended to consider and might adopt, has given those parties the opportunity for hearing required by the law and has based its decision on adequately expressed reasons designed to effectuate the public interest.

I.

What petitioners call the "statutory issue" (Pet. Brief p. 19)—and the court below called the "per se statutory construction" issue[14]—is an argument that as a matter of statutory construction Section 201(a)'s requirement of an "opportunity for hearing" must be interpreted to compel an evidentiary hearing. AT&T cites neither legislative history nor case law interpreting the statute to support its contention. Its argument is based on the assertion that the words of the statute itself and the FCC's past practice in interpreting the statute lead to the conclusion that an evidentiary hearing is required. These arguments are contrary to decisions of this Court and were correctly rejected by the FCC and the court below.

It first must be recognized that the Communications Act confers upon the FCC broad and flexible procedural powers with which to achieve its substantive goals.[15] Section 4(i) (47 U.S.C. § 154(i)) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Section 303(r) (47 U.S.C. § 303(r)) authorizes the Commission to "[m]ake such

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[14] 503 F.2d at 1264-66 (Pet. App. 28a-31a).

[15] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . ." In short, exercise of the Commission's statutory responsibilities "leaves wide discretion and calls for imaginative interpretation."[16]

It is a well established principle of administrative law that, absent a clear statutory mandate to the contrary, administrative agencies have the discretion to proceed in the consideration of problems by rule making, adjudication or other procedures considered appropriate by the agency in the particular circumstances. E.g., *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947). This principle was specifically applied to the FCC in the landmark case of *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). *Storer* held that the "full hearing" requirement of Section 309 of the Communications Act does not mean that the FCC is bound to follow a particular procedure. The method of meeting the requirement is left to the agency's own devising—to its informed judgment and discretion, exercised in light of the particular circumstances and the practical necessities of efficient administration. This principle has been consistently applied against the contention that "full hearing" necessarily means something more than a rule making proceeding.[17] It is,

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[16] *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 90 (1953).

[17] See *FPC* v. *Texaco Inc.*, 377 U.S. 33 (1964); *Air Line Pilots Assoc.* v. *Quesada*, 276 F.2d 892 (2nd Cir. 1960), *cert. denied*, 366 U.S. 962; *American Airlines, Inc.* v. *CAB*, 359 F.2d 624 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 843; *California Citizens Band Assoc.* v. *United States*, 375 F. 2d 43 (9th Cir. 1967), *cert. denied*, 389 U.S. 844; *Transcontinent Television Corp.* v. *FCC*, 308 F.2d 339 (D.C. Cir. 1962); *WBEN, Inc.* v. *United States*, 396 F.2d 601 (2nd Cir. 1968), *cert. denied*, 393 U.S. 914; *Logansport Broadcasting Corp.* v. *United States*, 210 F.2d 24 (D.C. Cir. 1954).

therefore, clear that there is ample precedent supporting the FCC's decision to use rule making rather than adjudication in the present case, and the course it adopted complied fully with the requirements of Section 201(a) of the Act.

Moreover, petitioners' contention that the words "opportunity for hearing" in Section 201(a) require an evidentiary hearing is disposed of by this Court's recent decision in *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224 (1973). See also *United States* v. *Alleghany-Ludlum Steel Corp.*, 406 U.S. 742 (1972). The *Florida East Coast* decision, somewhat cavalierly dismissed by petitioners, clearly establishes that the statutory phrase "opportunity for hearing" is neutral; it no more requires an evidentiary hearing than does the equivocal phrase "proceeding". As this Court recognized: [18]

> "The term 'hearing' in its legal context undoubtedly has a host of meanings. Its meaning undoubtedly will vary, depending on whether it is used in the context of a rule-making-type proceeding or in the context of a proceeding devoted to the adjudication of particular disputed facts." (footnote omitted)

AT&T's argument based on the bare words of the statute, unsupported by any citation to the legislative history, is without merit.

Petitioners' other argument on the "statutory issue" is that in prior cases, such as *Western Union Telegraph Co.*, 17 FCC 152 (1952), *reconsid. denied*, 17 FCC 503 (1953), the Commission has relied on adjudicatory proceedings in Section 201(a) proceedings. This argu-

[18] *United States* v. *Florida East Coast R. Co.*, 410 U.S. at 239.

ment is also without merit. While in *Western Union* the Commission did proceed by means of an adjudicatory hearing, the Commission is not tied to that particular procedure.[19] In responding to petitioners' argument on this point, the lower court correctly noted that as the complex field of communications develops and changes, procedural as well as substantive policy must remain flexible. The mere fact that an agency once regarded evidentiary hearings as appropriate does not bar it from adopting other methods when changing or new circumstances require a different approach.[20] The FCC's determination that rule making, rather than adjudication, was the appropriate vehicle to establish the general policy that AT&T must interconnect with the specialized carriers was a decision well within the discretion and the competence of the FCC.

Thus, the decision of the court below rejecting petitioners' argument that as a matter of statutory construction Section 201(a) requires an evidentiary hearing is clearly correct.

Petitioners (Pet. Brief pp. 22-25) attempt to recast this statutory argument in somewhat different terms by characterizing the proceeding as "adjudication" and urging "that in an adjudicatory proceeding, where important interests are at stake and disputed issues of material fact have been raised, an opportunity to have evidence submitted, tested, and evaluated before a deci-

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[19] [A]ny Agency is free . . . to accord litigants appearing before it more procedural rights than the Act requires . . . ." *United States* v. *Florida East Coast R. Co.*, 410 U.S. at 236, n.6.

[20] See 503 F.2d at 1264-65 (Pet. App. 28a-29a); see also *Phillips Petroleum Co.* v. *FPC*, 475 F.2d 842 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

sion is reached is mandatory." This is merely another attempt by petitioners to fragmentize the proceedings, to focus all attention on the show cause proceeding, and to insist on their own view of what took place despite the rulings of the Commission and the court to the contrary. As both the FCC and the court below found, the show cause proceeding was an interrelated proceeding following, and built upon, a full-scale rule making proceeding in which the parties were put on notice as to the issues and policy considerations involved and in which all interested parties were given a full opportunity to present their data and views both in written comments and by oral presentations before the Commission *en banc*. Moreover, in the show cause proceeding itself the parties were again given an opportunity in the form of written submissions and oral presentations before the Commission to address all the relevant issues. Thus, insofar as petitioners' contention is bottomed on its assertion that the present proceeding "began with a show-cause order directed against the Bell System" (Pet. Brief p. 23), its argument must be rejected as totally unsound and misleading.

To the extent that the position of petitioners (Pet. Brief pp. 23-25) can be read to argue that an evidentiary hearing is required because of the nature of the issues involved, even considering Docket No. 18920 and Docket No. 19896 as interrelated proceedings, this argument too must be rejected. Petitioners were accorded the opportunity to come forward with written material and to make oral presentations at least twice during the course of the interrelated proceedings. In each proceeding the FCC gave detailed notice of the matters to be covered, gave careful and detailed consideration to the matters raised, discussed the submis-

ions of the parties, made detailed findings with respect to all relevant issues, and finally adopted conclusions related to the statutory standards governing the relief requested. In each instance where a claim was made that there were disputed facts allegedly requiring an evidentiary hearing, the Commission, which has years of accumulated expertise in the regulation of the telephone network, made detailed findings as to why such claims were unsupported or were not relevant to the statutory objectives which the Commission is directed to achieve.[21]

Petitioners were thus given two separate opportunities to persuade the FCC that it should not order FX and CCSA interconnection. In both proceedings AT&T was given notice of the Commission's broad intentions and was afforded the opportunity to present its facts and arguments against the proposed interconnection. Inasmuch as petitioners can legitimately claim neither surprise nor denial of the opportunity to speak meangfully to the issues before the Commission, its contention that it was denied the "opportunity for hearing" required by due process of law must be rejected.

II

Petitioners' final argument (Pet. Brief pp. 26-32) is cast in the form of an allegation that the decisions below are contrary to the principle of *Morgan* v. *United States,* 304 U.S. 1 (1938). When stripped to essentials,

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[21] In view of AT&T continuous reference to the shibboleth of "network harm", it is interesting to note, as petitioners themselves point out (Pet. Brief pp. 31-32, n.48), that AT&T and the specialized carriers have already achieved agreement for interconnection, including FX and CCSA, which the FCC has accepted. See *Memorandum Opinion and Order in Docket No. 20099,* FCC 75-450, released May 7, 1975.

the argument comes down to petitioners' contention that the court below erred in upholding the interconnection order by sustaining the FCC's reliance on the *Specialized Common Carrier Services* decision. This is a narrow question of whether in fact AT&T was provided with adequate notice, a question extensively briefed by the parties before the FCC, decided contrary to the AT&T's position by the Commission, and upheld by the court below. The decision of the lower court is clearly correct and, in any event, this is not a novel or important issue of law under the standards of Supreme Court Rule 19 which should lead this Court to grant the writ of certiorari.

There is nothing equivocal about the decision of the court below on this point. The court held:

> "[W]e are convinced that the Commission's decision in Docket 18920 includes a direction to the established carriers to provide FX and CCSA to the specialized carriers on a non-discriminatory basis."

503 F.2d at 1259 (Pet. App. 19a).

The basis of this decision by the court below is amply supported by the record.[22] In brief, the court relied upon the following factors:

(1) The breadth of the Notice in Docket No. 18920 (24 FCC 2d 318) and the fact that it concerned the general topic of entry of new carriers in the private

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[22] AT&T's petition contains the somewhat cryptic contention (Pet. Brief p. 31, n.47) that the lower court's decision "nowhere comes to grips with the *Morgan* argument actually made by the Bell System". As set forth *infra* and at 503 F.2d 1269-70 (Pet. App. 37a-39a), the lower court did specifically resolve the *Morgan* argument adversely to AT&T.

line services field indicates that FX and CCSA were encompassed within Docket No. 18920. Thus, since the rule making itself went to the totality of competition in the provision of all private line services (Issue "A"), the generalized interconnection inquiry (Issue "E") also went to the totality of private line services, including FX and CCSA.[23] (503 F.2d at 1260, Pet. App. 19a)

(2) The Commission, in its decision in Docket No. 18920, considered the possibility of "total diversion" of AT&T's private line revenues as a result of the competition from the specialized carriers. This indicated the Commission's assumption that the new entities would provide services similar to the private line services being furnished by the established carriers. Since FX and CCSA account for a substantial share of AT&T's private line revenues, the reference to total diversion indicates that FX and CCSA were within the Commission's contemplation: (503 F.2d at 1260-61, Pet. App. 19a-22a)

(3) The Commission's directive that it contemplated "full and fair competition in the specialized field among all carriers, both established and new . . . ."[24] indicates that the Commission intended to authorize the new carriers to provide all elements of the private line services then being furnished by the established carriers, rather than an incomplete "package" of private line services. The Commission's finding that the provision of interstate private line service should be on a full, fair and nondiscriminatory basis would be mean-

[23] As set forth at p. 5, *supra*, it is important to note that AT&T itself classifies FX and CCSA as private line services.

[24] 29 FCC 2d at 916 (1971).

ingless without the provision of the full range of private line services. (503 F.2d at 1261-62, Pet. App. 22a-23a)

(4) The narrow interpretation sought by petitioners here would frustrate the basic objectives enunciated in the Docket No. 18920 proceeding, in which the Commission repeatedly used the generic term "private line service", which put AT&T on notice that it would be expected to provide interconnections for the full range of such services. The denial of interconnection facilities for the specialized common carriers similar to those provided to AT&T's "affiliated carrier", the Long Lines Department, would place them at a definite disadvantage in obtaining customers and frustrate the Commission's objectives in authorizing entry by the specialized carriers. (503 F.2d at 1262, Pet. App. 23a)

The "evidence" set forth by AT&T in opposition to this conclusion is slim indeed. In order to attempt to rebut the well-reasoned conclusions of the lower court, petitioners rely on ambiguous statements made in Commission briefs in related Ninth and Second Circuit proceedings and on a statement taken out of context from the decision of the court below.

Petitioners (Pet. Brief p. 28) make much of a statement in the Commission's brief filed in the Ninth Circuit, which later affirmed the Commission's decision in the *Specialized Common Carrier Services* case, *Washington Utilities and Transportation Comm'n.* v. *FCC*, Nos. 71-2919 and 72-1198 (9th Cir. Jan. 20, 1975), *rehearing denied,* March 12, 1975. The Commission's brief contained the statement that the *Specialized Common Carrier Services* decision did not contemplate interconnection of the specialized common carriers into

the switched network (see Pet. App. F). However, the appeal in the Ninth Circuit did not involve the matter of interconnection, as AT&T itself admits (Pet. Brief p. 29, n. 45). The brief's reference to interconnection was therefore gratutious and in any event the Commission has indicated, and the lower court agreed, that any such representation was unintentional.[25] Similarly, petitioners' reliance on the Commission's cautious statement in the Second Circuit case (which was a precautionary appeal taken by AT&T from the Commission's letter order of October 4, 1973) is also misplaced. In his brief, the Commission's General Counsel said that the Commission *could* rule in Docket No. 19896 that it was never its intention to allow MCI to provide FX or CCSA service. This statement is entirely obviated by the Commission's—and the court's—subsequent clear holdings that the *Specialized Common Carrier Services* decision *did* indeed contemplate interconnections for such services. The statement simply sets forth an academically possible result. That possibility of course, did not eventuate.

Petitioners' reliance (Pet. Brief p. 27) on the lower court's statement that "[t]here is no mention of FX and CCSA in the *Specialiezd Common Carrier Services* decision" is misleading since it is taken out of context. The paragraph from which this quotation was taken reads in full as follows:

> "*At first glance,* AT&T's characterization of the proceedings appears to have merit. There is no mention of FX or CCSA in the *Specialized Common Carrier Services* decision. Instead, the Commission speaks only generally of 'private line services,' without reference to the components of such service. Nevertheless, upon closer examination, *we are convinced that the Commission's decision in*

[25] 503 F.2d at 1260, n.12 (Pet. App. 19a, n.12). See 46 FCC 2d at 425, n.14 (Pet. App. 226, n.14).

> *Docket 18920 includes a direction to the established carriers to provide FX or CCSA to the specialized carriers on a non-discriminatory basis.* We base this conclusion upon a number of factors." (emphasis added)

503 F.2d at 1259 (Pet. App. 18a-19a).

It is thus clear that AT&T's reliance on this statement by the lower court provides no support for its *Morgan* argument.

Petitioners' final point of contention is based on the Third Circuit's earlier decision vacating the injunction granted to MCI by the district court.[26] The court below clearly and unequivocally rejected AT&T's reading of its first opinion.[27] As set forth by the lower court, the vacation of the district court's affirmative injunction was a matter of primary jurisdiction only. Since the FCC had already announced that it would consider the precise question in its Docket No. 19896 proceeding, the court felt that it would be beneficial for the court to await the FCC's decision before proceeding with the mandamus case.[28]

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[26] *MCI Communications Corp.* v. *AT&T*, 496 F.2d 214 (3rd Cir. 1974), see n.12, *supra*.

[27] See 503 F.2d at 1263 (Pet. App. 25a). It should be noted that two of the three members of the panel which decided this case were members of the panel in *MCI Communications Corp.* v. *AT&T*.

[28] Petitioners (Pet. Brief pp. 30-31, n.46) also seek comfort in a line of questions propounded by Commissioner Wiley in the oral argument in Docket No. 19896, in which he inquired as to why FX and CCSA were not specifically mentioned in the *Specialized Common Carrier Services* proceeding. The short answer to petitioners' point is that these are the types of questions frequently used to elicit information and to bring disputed issues into focus. Commissioner Wiley's questions were answered during oral argument (A. 926-27, A. 931-32), and he was obviously satisfied since he voted in favor of the decision which interpreted the order in the *Specialized Common Carrier Services* proceeding as comprehending FX and CCSA.

Moreover, in any event, in Docket No. 19896 the FCC once again proceeded to address itself to the arguments strenuously advanced by AT&T that substantial and significant differences exist between interconnection for FX and CCSA and interconnection for other private line services and that, by reason of these differences, an evidentiary hearing was essential. Once again, after analyzing the entire course of proceedings, and all of AT&T's arguments, the Commission concluded that an interconnection order, including provision for FX and CCSA, should issue.

Analysis of the entire course of proceedings thus makes it apparent that AT&T had clear notice of the Commission's intentions. Over the course of three interrelated proceedings during which jurisdiction with respect to interconnection was explicitly retained —the Commission first held a long adjudicatory hearing in which the subject of interconnection was initially broached. It then conducted a full-scale rule making proceeding in which the parties were put on notice as to the issues, policies and considerations and tentative conclusions in the form of a detailed staff report which discussed the services to be provided by the specialized carriers and their corresponding need for interconnection in the broadest possible terms. All interested parties were given ample opportunity to present their data, views, and comments in an oral presentation before the Commission *en banc*. Finally, the Commission held a third proceeding in which the parties were again given an opportunity in the form of written submission and oral presentation to the Commission to address all the relevant issues. In each proceeding the Commission afforded specific and detailed notice of the matters to be covered. Accordingly, petitioners' argu-

ment that they were denied the notice required by the *Morgan* case is without merit.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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May, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U.
FILED
MAY 16 1975
MICHAEL RODAK, JR., C

No. 74-1229

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Petitioners.

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, THE WESTERN UNION TELEGRAPH COMPANY

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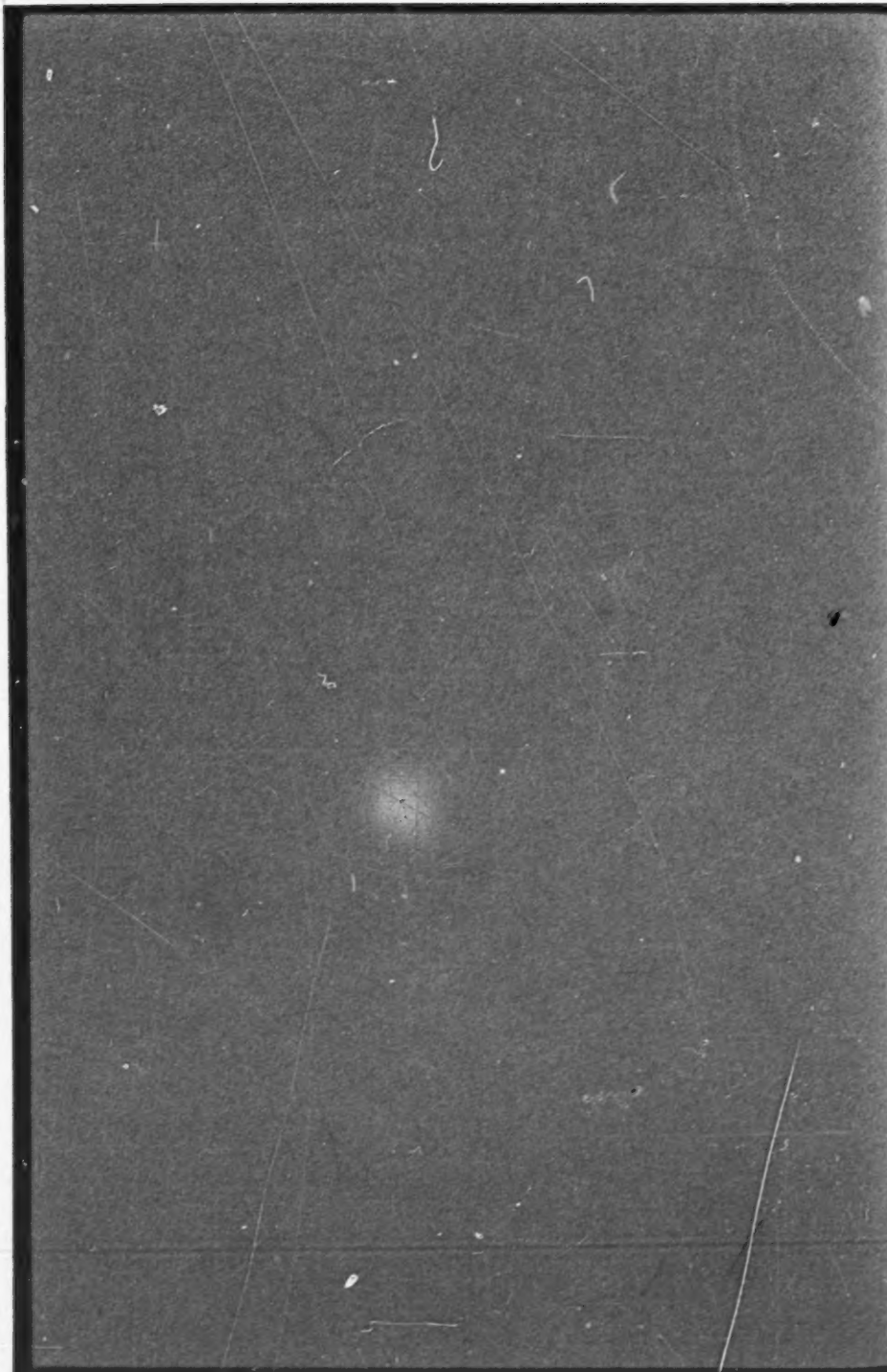

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1229

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*
Petitioners.

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*
Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, THE WESTERN UNION TELEGRAPH COMPANY

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A)[1] is reported at 503 F.2d 1250. The Decision of the Federal Communications Commission (Pet. App. B) is reported at 46 F.C.C.2d 413.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. C) was entered on September 11, 1974. A timely

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[1] "Pet." refers to the Petition for Certiorari filed by American Telephone and Telegraph Company and the Bell System. "Pet. App." refers to the separately bound appendix to the Petition. "A." refers to the appendix in the court below which has been lodged with the Clerk of this Court. Pet. 5 n.6.

petition for rehearing was denied on October 30, 1974 (Pet. App. D). By order dated January 14, 1975, Mr. Justice Brennan extended the time within which to file a petition for writ of certiorari to and including March 28, 1975, and the petition was docketed on March 28, 1975. By letter dated April 15, 1975, the Clerk extended the time within which the non-federal respondents may file their briefs in opposition to and including May 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the court below erred in holding (a) that, under the Communications Act of 1934, a communications common carrier may not abrogate lawful contractual obligations to furnish service to another carrier in accordance with rates, terms, and conditions specified in such contracts, by means of a unilateral filing with the Federal Communications Commission of tariff schedules containing provisions in conflict with the contracts; and (b) that the facts of the instant case bring it within the doctrine of *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), rather than *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908).

STATUTES INVOLVED

The statutes involved are reproduced in Appendix E to the Petition for Certiorari.

STATEMENT OF THE CASE

The Bell System's[2] petition presents two distinct and only marginally related issues. These issues were

[2] In this brief, "AT&T" refers to the Bell parent company, and "Bell System" refers to the entire Bell complex of companies, including AT&T and its 24 operating subsidiaries.

decided by the Federal Communications Commission ("FCC") in a single proceeding, and the FCC's decision was considered and affirmed by the Court of Appeals for the Third Circuit on separate and discrete grounds in the opinion below. One issue (raised in paragraphs 1 and 2 of the Questions Presented in the Petition[3]) is whether the FCC erred in ordering the Bell System to physically interconnect their communications network with those of specialized common carriers.[4] The other issue (paragraph 3 of the Questions Presented[5]) is whether the FCC erred in rejecting Bell System tariffs conflicting with, and designed to abrogate, outstanding exchange of facilities contracts between the Bell System and Western Union ("Bell-Western Union contracts") providing for lease of communications facilities. This brief is directed exclusively to the latter question, which is limited in its significance and effect to these particular contracts and parties.

1. The Bell-Western Union Contracts

The particular contracts here involved have their origin in mutual arrangements for the lease of facilities that date back to the 19th century. The first formal contract between Western Union and the Bell

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[3] Pet. 3.

[4] The term "specialized common carriers" refers to a carrier that does not provide the full range of common carrier services contemplated by the Communications Act (Pet. App. 7a n.3). For purpose of the agency's interconnection policies, the FCC defined the term to include "non-Bell, non-telephone communications common carriers", which therefore includes Western Union (Pet. App. 3b). *See also* Interconnection Facilities for The Western Union Tel. Co., 49 F.C.C.2d 321, 322 (1974).

[5] Pet. 3-4.

System governing the leasing of facilities was signed in 1909. Standardized forms of contract, first used in 1928, have been modified from time to time, the latest version being the contracts here involved, which became effective January 1, 1970 (Pet. App. 47a, 32b). These contracts were filed with the FCC pursuant to Section 211(a) of the Communications Act of 1934, 47 U.S.C. § 211(a) (Pet. App. 53a n.43, 33b).

The contracts provide for leasing of both local distribution (intra-city) and interexchange (inter-city) facilities by and between the Bell System and Western Union under specified terms and conditions, including fixed price terms.[6] While the contracts impose an obligation on both the Bell System and Western Union to lease facilities to each other upon request, in recent times Western Union has leased a far greater number of facilities from the Bell System companies than the latter have leased from Western Union (Pet. App. 32b; A. 1134). In 1972, Western Union leased from the Bell System approximately 80 percent of its requirements for intra-city distribution facilities and approximately 20 percent of its requirements for inter-city facilities (A. 910).[7]

The contracts permit Western Union to avoid the economic burden on its customers and the adverse

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[6] There are individual contracts providing for mutual facilities leasing arrangements between Western Union and each of the twenty-four Bell System operating companies, as well as between Western Union and AT&T (for interexchange facilities only).

[7] In 1970, the FCC observed that "Western Union is almost entirely dependent on the Bell System for its local distribution," apparently referring to intra-city facilities. Specialized Common Carrier Services, 24 F.C.C.2d 318, 347 (1970).

environmental impact involved in duplicating Bell's extensive cable network. Such intercarrier arrangements have been encouraged by the FCC since enactment of the Communications Act of 1934.[8] Since the contracts have no fixed term, but are terminable by either party only upon five years' notice (Pet. App. 47a, 32b), both parties, but particularly Western Union, were able to rely, and did rely, upon both the availability of and the cost of leased facilities in planning their communications systems for a reasonable future period.

2. The Advent of the Specialized Common Carriers

The present controversy over the Bell-Western Union contracts stems from the FCC's initiative, commencing in 1969, to open the private-line communications field to competition by allowing new competitive entry. Following its award of construction permits to a new carrier, Microwave Communications, Inc. ("MCI"), to provide private-line service between Chicago and St. Louis in 1969,[9] the FCC in 1971 adopted a policy favoring the entry of such new carriers, and providing that established carriers "should, upon request, permit interconnection . . . on reasonable terms and conditions to be negotiated with the new carriers. . . ." *Specialized Common Carrier Services*, 29 F.C.C.2d 870, 940 (1971) *aff'd sub nom. Washington Util. Comm'n* v. *FCC*, —— F.2d ——, Nos. 71-2919 & 72-1198 (9th Cir., Jan. 20, 1975). The

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[8] *See* Mackay Radio & Tel Co., 6 F.C.C. 562, 565 (1938); DOMESTIC TELEGRAPH INVESTIGATION REPORT, FCC Docket No. 14650, at 181 *et seq.* (1966).

[9] Microwave Communications, Inc., 18 F.C.C.2d 953 (1969), *reconsideration denied*, 21 F.C.C.2d 190 (1970).

Bell System did not appeal this order (Pet. App. 11a) and thus was faced with the prospect of having to furnish potential new competitors for private-line business with facilities essential for their competitive success. Significantly, it was during the 1969-1970 period that the Bell System and Western Union renegotiated their exchange of facilities contracts, leading to the contracts here involved, which were effective January 1, 1970.

Following the Commission's decision in *Microwave Communications, Inc., supra,* interconnection agreements were negotiated between Bell and MCI. Disputes soon arose between them, however, as to the terms and coverage of such arrangements. MCI claimed that it was entitled to terms, conditions and services no less favorable than those available to the Long Lines Department of AT&T and to Western Union under the contracts here involved. This issue apparently remained unresolved throughout negotiations that continued into the summer of 1973. (Pet. App. 11a.)

Meanwhile, in the fall of 1972, AT&T advised Western Union of its desire to negotiate an upward revision of the rates contained in the Bell-Western Union contracts. These negotiations continued until the late summer of 1973 when AT&T informed Western Union that the Bell System operating companies planned to terminate their respective contracts unilaterally, and file with various state regulatory authorities intrastate tariffs which (rather than the contracts) thereafter purportedly would govern the terms and conditions upon which facilities physically located within those respective states would be leased to Western Union (Pet. App. 47a, 32b-33b; A. 42).

In September, 1973, AT&T and the various Bell System operating companies gave Western Union formal notice of their unilateral termination of the contracts (Pet. App. 47a, 32b; A. 42, 45-47). Although the contracts by their terms are terminable only on five-years' written notice and hence would expire in September 1978, the Bell System contended that when the intrastate tariffs to be filed with the state regulatory authorities became effective, the tariffs would immediately supersede the contracts. From September to November 1973, pursuant to this strategy, the various Bell operating companies filed intrastate tariffs with the state regulatory commissions of more than forty states and the District of Columbia. (A. 42, 1134.)

3. The Proceedings Below

Since 80 to 90 percent of the communications carried over the facilities Bell leased to Western Union are interstate in character, the FCC asserted its paramount jurisdiction over such facilities, and required the Bell System to file with it tariffs essentially comparable to the tariffs Bell had filed with the state agencies (Pet. App. 12a, 6b, 33b).[10] In December 1973, Western Union petitioned the Commission to reject the Bell System's FCC tariff filings, insofar as they purported to apply to facilities and services then covered by the existing Bell-Western Union contracts.[11]

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[10] Prior to the issuance by the FCC of the decision reviewed below, four state regulatory commissions, over the objections of Western Union, permitted the state tariffs to become effective. After the FCC decision became effective, the Bell System operating companies withheld implementing any additional state tariffs, and raised no challenge in the Court of Appeals to the FCC's assertion of paramount jurisdiction.

[11] Western Union also filed a letter of complaint with the FCC on November 1, 1973, challenging the lawfulness of Bell's filing

The Commission deferred action on the petition, pending completion of the administrative proceeding which is the subject of this review proceeding, and permitted the tariffs to become effective for all users except Western Union (Pet. App. 38b). Following briefing and a full day of oral argument, the Commission issued an order, affirmed by the court below, rejecting the tariffs filed by the Bell System companies insofar as they applied to facilities and services covered by the Bell-Western Union contracts (Pet. App. 32b-40b).

The abrogation of its contracts by the Bell System tariffs would have had a major economic and operating impact on Western Union. Not only would the tariffs have significantly increased the rates charged Western Union as compared to the contract rates, upon which Western Union was entitled to rely for not less than five years following notice of termination (Pet. App. 39b), but the tariffs would also have substantially reduced the kinds of facilities which Western Union would have been able to lease under the contracts (Pet. App. 34b).[12] Consequently, if the tariffs had been permitted to supersede the contracts, Western Union would have been required to undertake a massive emergency modification of its equipment and operating procedures at costs which would necessarily have been passed on to its custo-

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tariffs with state regulatory commissions whose purported effect would be to supersede the Bell-Western Union contracts (Pet. App. 47a; A. 41-129).

[12] For a description of the changes contemplated by the tariffs see ITT World Communications, Inc. v. New York Tel. Co., 381 F.Supp. 113, 115-17 (S.D.N.Y. 1974), *appeals dismissed per stipulation*, Nos. 74-2088 and 74-2203 (2d Cir. April 18, 1975).

mers and could have affected its viability in competing against the Bell System.

The Bell System appealed the FCC's decision on this issue to the Court of Appeals for the Third Circuit, which affirmed, relying principally upon *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), for the proposition that the unilateral filing of a tariff did not abrogate a valid intercarrier contract. The court reasoned that the contracts were sanctioned by the Communications Act which, like the Natural Gas and Federal Power Acts involved in *Mobile* and *Sierra*, did not provide a mechanism for much unilateral abrogation.

ARGUMENT

As the court below recognized, its decision (as well as the petition for certiorari) presents two "completely distinct legal issues" (Pet. App. 8a). Whatever the importance of the interconnection issue,[12] the continuing validity *vel non* of these particular Bell-Western Union contracts raises only an issue of limited importance, affecting only these parties, not likely to recur, correctly decided by the Court of Appeals in a unanimous opinion manifesting careful and thorough application of the law to these facts, and not warranting plenary review by this Court.

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[12] Since the FCC's definition of "specialized common carrier" embraces Western Union (*see* note 4, *supra*), there is no dispute that Western Union is entitled to the same service furnished to other specialized common carriers on equal terms. However, since Western Union, unlike the other non-federal respondents, was not a party to the interconnection dispute, it took no position on the legal merits of that dispute before the Commission or the Court of Appeals, and accordingly refrains from doing so in this Court as well.

The Bell-Western Union contracts are unique and of limited effect. As a practical matter, given the changed circumstances of the present and the future, it is most unlikely that the Bell System will hereafter negotiate individual bilateral contracts with Western Union and the other specialized common carriers where a general unilateral tariff filing applicable to all such carriers could be used. Indeed, the Commission has expressly required that all interconnection arrangements of services and facilities with specialized common carriers and domestic satellite carriers be filed with the FCC as tariffs,[14] and the Bell System has acquiesced in that policy.[15] Further, since the Bell-Western Union contracts will expire in September 1978, pursuant to the various notices of termination given by the Bell System operating companies, the relationship between the Bell System and Western Union will then almost certainly be governed by filed tariffs. Hence, the issue, although substantial between these parties, is of diminishing concern and clearly lacks general importance.

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[14] *See* Pet. App. 31b, 43b-44b; American Tel. & Tel. Co., 42 F.C.C.2d 654, 660 (1973); American Tel. & Tel. Co., FCC Docket No. 20099, FCC 75-450, at ¶ 5 (May 7, 1975). The FCC has recently initiated a rulemaking proceeding to determine whether this policy should be extended to service provided to international record carriers. *See* Interconnection Facilities Provided to the International Record Carriers, FCC Docket No. 20452, FCC 75-451 (May 7, 1975). Less formal procedures for determining whether to extend this policy to radio common carriers have also been instituted. *See* American Tel. & Tel. Co., FCC Docket No. 20099, *supra* at ¶ 17.

[15] *See* American Tel. & Tel. Co., FCC Docket No. 20099, *supra* n. 14, ¶¶ 12-13. The Bell System did not contend in the court below and does not assert in the petition here that the FCC lacks authority to require the tariffing of intercarrier arrangements.

As shown below, there is no conflict of decisions requiring resolution by this Court, and the court below correctly applied this Court's decisions in *Mobile* and *Sierra* in dealing with the Bell-Western Union contract issue. Accordingly, further review of that issue is not warranted.

1. There is No Conflict of Decision.

Dressed up as a "conflict" ground for review, the Bell System's principal argument is that the decision below is erroneous under *Armour Packing Co.* v. *United States,* 209 U.S. 56 (1908). As the Court of Appeals recognized, however, that case held only that, under Section 2 of the Interstate Commerce Act, 49 U.S.C. § 2, a tariff filing supersedes a private contract between a carrier and a shipper, since private contracts between carriers and shippers are illegal under that Act (Pet. App. 48a-51a).[16] The rule of that case is therefore inapplicable to a tariff filing inconsistent with a valid contract between two carriers, which is entirely lawful under that Act.[17] Thus,

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[16] The Court of Appeals relied on the analysis of Mr. Justice Harlan, writing for a unanimous Court in *Mobile,* that "the Interstate Commerce Act by its own force precluded contracts for rates different from those applicable to other shippers." (Pet. App. 50a-51a, *quoting* United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 345 (1956).)

[17] Arrangements between rail carriers are governed by Section 6(5) of the Interstate Commerce Act, *as amended,* 49 U.S.C. § 6(5), which was the model for Section 211(a) of the Communications Act, 47 U.S.C. § 211(a), the controlling statute in this case, not Section 2 of the Interstate Commerce Act, 49 U.S.C. § 2, which controlled the outcome in *Armour Packing.* For examples of contracts between railroad carriers, *see, e.g.,* Southern Ry. v. Louisville & N.R.R., 185 F.Supp. 645 (W.D. Ky. 1960), *aff'd per curiam,* 289 F.2d 934 (6th Cir. 1961), Houston Belt & Terminal Ry.

there is plainly no "conflict" between the decision below and *Armour Packing.*[18]

The petition also asserts a conflict in the circuits between the Third Circuit's decision below and the Fourth Circuit's decision in *Cincinnati N.O. & T.P. Ry.* v. *Chesapeake & O. Ry.*, 441 F.2d 483 (4th Cir. 1971). That case involved a statutory action to recover charges under a tariff, which the Interstate Commerce Commission had permitted to become effective, and merely stands for the well-established general proposition, which neither the Third Circuit nor any of the parties here questions, that "a tariff, so long as it is in effect, must be treated as though it has the force of law." *Id.* at 488, *citing Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 197 (1913); *see also Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 386 (1932). A strong argument can be made that the Interstate Commerce Commission's decision permitting a tariff filing inconsistent with a pre-existing contract to become ef-

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v. United States, 153 F.Supp. 3 (S.D. Tex. 1957), *aff'd per curiam*, 356 U.S. 23 (1958); *cf.* Seatrain Lines, Inc. v. Pennsylvania R.R., 207 F.2d 255 (3d Cir. 1953).

[18] Petitioners argue that the FCC has recognized the applicability of *Armour Packing* to an intercarrier contract in Cruces Cable Co., 35 F.C.C.2d 707 (1972), *reconsideration denied*, 39 F.C.C.2d 552 (1973). As the court below recognized, however, the contract in *Cruces Cable* expressly incorporated by reference a filed tariff, and contemplated that modifications in the tariff rate made from time to time would automatically revise the contract rate accordingly. *See* United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., 358 U.S. 103 (1958). *Cruces Cable* thus has no bearing on the instant contracts in which the rates are fixed for the contracts' term and not made subject to subsequently fixed changes in tariff rates. *See also* Richmond Power & Light v. FPC, 481 F.2d 490, 493 (D.C. Cir.), *cert. denied*, 414 U.S. 1068 (1973).

fective was erroneous, and that if judicial review had been sought under 28 U.S.C. § 2325, the decision would have been reversed. *See Associated Press* v. *FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971).[19] But the railroads that objected to the higher charges contained in the tariff declined to pursue either that remedy, or other administrative remedies open to them, and simply ignored the tariff. 441 F.2d at 489. The case thus upholds the familiar rule that payment for jurisdictional services must be made in accordance with a published tariff in force, until the tariff is set aside. It follows that the lawfulness of the ICC's permitting the tariff to become effective was not before the court. *Id.* at 488. Accordingly, the court's comments with respect to this issue are mere *dicta* of doubtful correctness, and the holding, in any event, does not conflict with that of the court below.[20]

2. The Court Below Correctly Applied this Court's Decisions in *Mobile* and *Sierra Pacific* to the Bell-Western Union Contracts.

Mobile[21] and *Sierra Pacific*[22] involved the question whether unilateral tariff filings could abrogate

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[19] In that case, the D.C. Circuit noted:

> We recognize, however, that an agency has the power and in some cases the duty to reject a tariff that is demonstrably unlawful on its face. Thus, an agency will reject a tariff that conflicts with the statute, agency regulation or order, or with *a rate fixed in a contract sanctioned by statute* . . . . [448 F.2d at 1103; emphasis added.]

This is the general rule followed by the court below that petitioners seek to have overturned.

[20] Neither the opinion of the Fourth Circuit nor the briefs of the parties mention this Court's decision in United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956).

[21] *Ibid.*

[22] FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

fixed-price contracts under the parallel rate change procedures of the Natural Gas[22] and the Federal Power Acts[24] respectively. This Court held in *Mobile*, first, that the Natural Gas Act contemplates the existence of contracts governing transactions subject to FPC regulation, *i.e.*, that the provision of service under contracts is permitted. Such contracts must be filed with the Commission, and the Act empowers the Commission to investigate their lawfulness under the just and reasonable standard contained in Section 5(a) of that Act, 15 U.S.C. § 717d(a). *Mobile* further held that there is no mechanism in the Act permitting a unilateral tariff filing to change the terms of a contract. Thus, a party entering into such a contract could not avoid its common law contractual obligation merely by filing a tariff with the Commission.[25] Accordingly, the Court in *Mobile* concluded that the common law obligation to perform under the contract or to respond in damages remained unaltered by the Natural Gas Act, and that the unilateral tariff filing was a nullity and must be rejected. 350 U.S. at 347.

Both the FCC and the court below correctly applied the *Mobile* holding to the Bell-Western Union contracts in the context of the Communications Act. As the court below recognized, the critical distinction

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[22] §4, *as amended*, 15 U.S.C. § 717c.

[24] § 205, 16 U.S.C. § 824d.

[25] This Court's companion *Sierra Pacific* decision held that while the Commission (under the Federal Power Act) had the power to abrogate private contracts, it could exercise that power only where such action is required to serve the public interest, not merely the private advantage of one of the contracting parties. 350 U.S. at 353-55.

between *Mobile* and *Armour Packing* is the provision of the Interstate Commerce Act that precludes contracts between carriers and shippers. Although the Communications Act may be read as also precluding contracts between carriers and customer-users, the Court explicitly held that the Act contains "no . . . directive barring contractual relations between independent carriers. (Pet. App. 51a-52a.) Indeed, such contracts have been commonplace in the communications industry since long before the enactment of the Communications Act. *See* pp. 3-4, 5 n.8, *supra.* Section 211(a) of the Communications Act, 47 U.S.C. § 211 (a), requires, *inter alia,* that every carrier subject to the Act file with the Commission copies of any contract which it makes with another carrier "in relation to any traffic affected by the provisions of this Act to which it may be a party."[26] Further, Section 203(c), requires that carriers must file tariffs with the FCC governing all jurisdictional communications services "unless otherwise provided by or under the authority of this Act."[27]

Sections 211(a) and 203(c), taken together, make it plain that the Communications Act allows communications common carriers to order their dealings in either of two ways: (1) by *contract,* filed under Sec-

[26] As we have already demonstrated (*see* note 17, *supra*), this section was patterned after Section 6(5) of the Interstate Commerce Act, *as amended,* 49 U.S.C. § 6(5), not Section 2 of that Act, 49 U.S.C. § 2, under which *Armour Packing* was decided.

[27] In addition to Section 211(a), Section 201(b), 47 U.S.C. § 201(b), recognized the validity of intercarrier contracts by providing expressly that a common carrier may enter into a contract with any common carrier not subject to the Act "for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest."

tion 211, where the provision of services to other carriers is involved, and (2) by *tariff*, under the procedures of Section 203, where the provision of services to the public is involved.[28] In short, the Communications Act, like the Natural Gas Act, the Federal Power Act, and, indeed, the Interstate Commerce Act, contemplates the provision of service pursuant to private contract; in the case of the Interstate Commerce and Communications Acts, only insofar as service is provided by one carrier to another.[29]

Further, as the court below correctly noted, the rate changing mechanisms of the Communications Act are virtually a carbon copy of those in the Natural Gas Act and the Federal Power Act (Pet. App. 60a). These rate changing mechanisms do not provide statutory authorization for unilateral modification of contracts (Pet. App. 59a-61a). The only distinction that petitioner is able to draw among the three statutory schemes is the authority conferred on the Federal Power Commission by Section 4 of the Natural Gas Act, *as amended*, 15 U.S.C. § 717c, and Section 205 of the Federal Power Act, 16 U.S.C. § 824d, to grant initial regulatory approval of a contract filed with that agency.

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[28] Petitioners do not challenge this assertion, and, indeed, concede that "under both statutes [the Communications Act and the Interstate Commerce Act] contractural arrangements may exist. . ." (Pet. 36). Under the rationale of *Mobile*, this concession is fatal to petitioners' case.

[29] We do not question that service to other carriers is service to a segment of the public. *Cf.* American Trucking Ass'ns, Inc. v. Atchison, T. & S. F. Ry., 387 U.S. 397, 406-08 (1967). Hence, where a carrier proposes to serve other carriers, the offering carrier has the option of negotiating contracts with its customers or filing a tariff.

To be sure, there is doubt whether the FCC possesses comparable power to review the lawfulness of contracts filed with it pursuant to Section 211(a).[30] Although Bell rests heavily on this possible distinction, it does not explain why the FCC's possible lack of power to review contract rates prior to their becoming effective necessarily creates or implies the power to sanction unilateral abrogation of such contracts after they have become effective. Mr. Justice Harlan's opinion in *Mobile* did not rest on an FPC power to approve or disapprove contracts prior to effectiveness; rather, the Court relied on an absence of statutory intent to prohibit or void the binding effect of common law agreements.

The court below therefore correctly rejected this possible distinction as irrelevant under the *Mobile* rationale and declined to pass on the scope of the FCC's jurisdiction to regulate privately-negotiated contracts. What controlled in *Mobile,* and compels a similar result here, was that Congress had contemplated that rates could be set by private agreement, and that no statutory mechanism was provided for their unilateral abrogation.[31] Hence, the court be-

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[30] The Commission has previously disclaimed such authority under the Communications Act. *See Hearings on Amendments to Title II of the Communications Act of 1934 Before the House Comm. on Interstate and Foreign Commerce,* 88th Cong., 2d Sess. 12-47 (1964). In 1945, the Commission expressly declared that private intercarrier contracts were not subject to the tariff filing machinery of Sections 203 and 204 of the Act, 47 U.S.C. §§ 203, 204, but reserved decision on the scope of the agency's jurisdiction over such tariffs to an appropriate future instance (A. 488). This uncertainty has never been adjudicated by the courts, and is not directly presented in this case.

[31] A contrary conclusion would raise substantial due process problems presented to, but not reached by, the court below in view

low correctly concluded that the Bell-Western Union contracts were valid and that subsisting common law obligations could not be abrogated by means of a unilateral tariff filing.

3. The Bell System Was Required to Obtain a Certificate Under Section 214(a) of the Communications Act Before Discontinuing Service to Western Union Covered by the Contracts.

The FCC's order reviewed below affirming the continuing validity of the Bell-Western Union contracts made the independent point that implementation of the tariffs would have resulted in discontinuance or impairment of services provided under the contract, and that the Bell System had not sought and obtained from the Commission a certificate under Section 214 (a) of the Communications Act, 47 U.S.C. §214(a), authorizing such discontinuation or impairment (Pet. App. 34b).[32] The court below did not reach this argument (Pet. App. 64a n.53), since it upheld the Commission's order on the alternative ground previously

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of its disposition of this issue. A taking of Western Union's valuable property rights in its contracts by governmental action for public use must be justified by public interest imperatives, not merely the private interests of a regulated entity, such as the Bell System, in attempting escape from what now appears to it as an improvident bargain. *See* Arkansas Natural Gas Co. v. Railroad Comm'n, 261 U.S. 379, 383 (1923); FPC v. Sierra Pacific Power Co., 350 U.S. 348, 355 (1956).

[32] The pertinent language in Section 214(a) reads:

> . . . No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby. . . .

See also ITT World Communications, Inc. v. New York Tel. Co., 381 F.Supp. 113, 120-21 (S.D.N.Y. 1974), *appeals dismissed per stipulation*, Nos. 74-2088 and 74-2203 (2d Cir. April 18, 1975).

discussed, following this Court's decisions in *Mobile* and *Sierra Pacific.*

There can be no doubt that Section 214(a) applies to a service provided by one carrier to another, since by its terms it applies to all "service" regulated by the FCC. As previously noted,[33] it is equally clear that the abrogation of the contracts by Bell's tariff filing would have resulted in a substantial diminution or modification of the service provided by the Bell System in leasing facilities to Western Union, and hence to the communities of communications customers served by Western Union. The Commission's clearly correct holding that the tariff filings were unlawful under Section 214(a), although not reached by the court below in upholding the validity of the Bell-Western Union contracts, is an additional reason for denying further review.

4. The Continuing Validity of the Bell-Western Union Contracts Is Not of General Importance and Does Not Warrant Review by This Court.

As noted (pp. 7, 10, *supra*), the various Bell-Western Union contracts will expire by their terms in September 1978. It is almost inconceivable that the Bell System would hereafter attempt to negotiate individual contracts with the growing number of specialized carriers in the face of clear FCC policy that intercarrier services be governed by tariffs. Thus, the holding below will not have any bearing on any other transaction regulated by the FCC, and its importance is confined to the ongoing Bell System and Western Union relationship for a limited, definite, and rapidly shrinking future period.

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[33] P. 8, *supra.*

CONCLUSION

The question whether the Bell System should be required to fulfill its contractual obligations to Western Union has no general importance, and little present and declining future importance to the particular parties. There is no conflict of decisions in the lower courts requiring resolution by this Court. The decision below is plainly correct. Further review of the petitioner's third Question Presented is not warranted.

Respectfully submitted,

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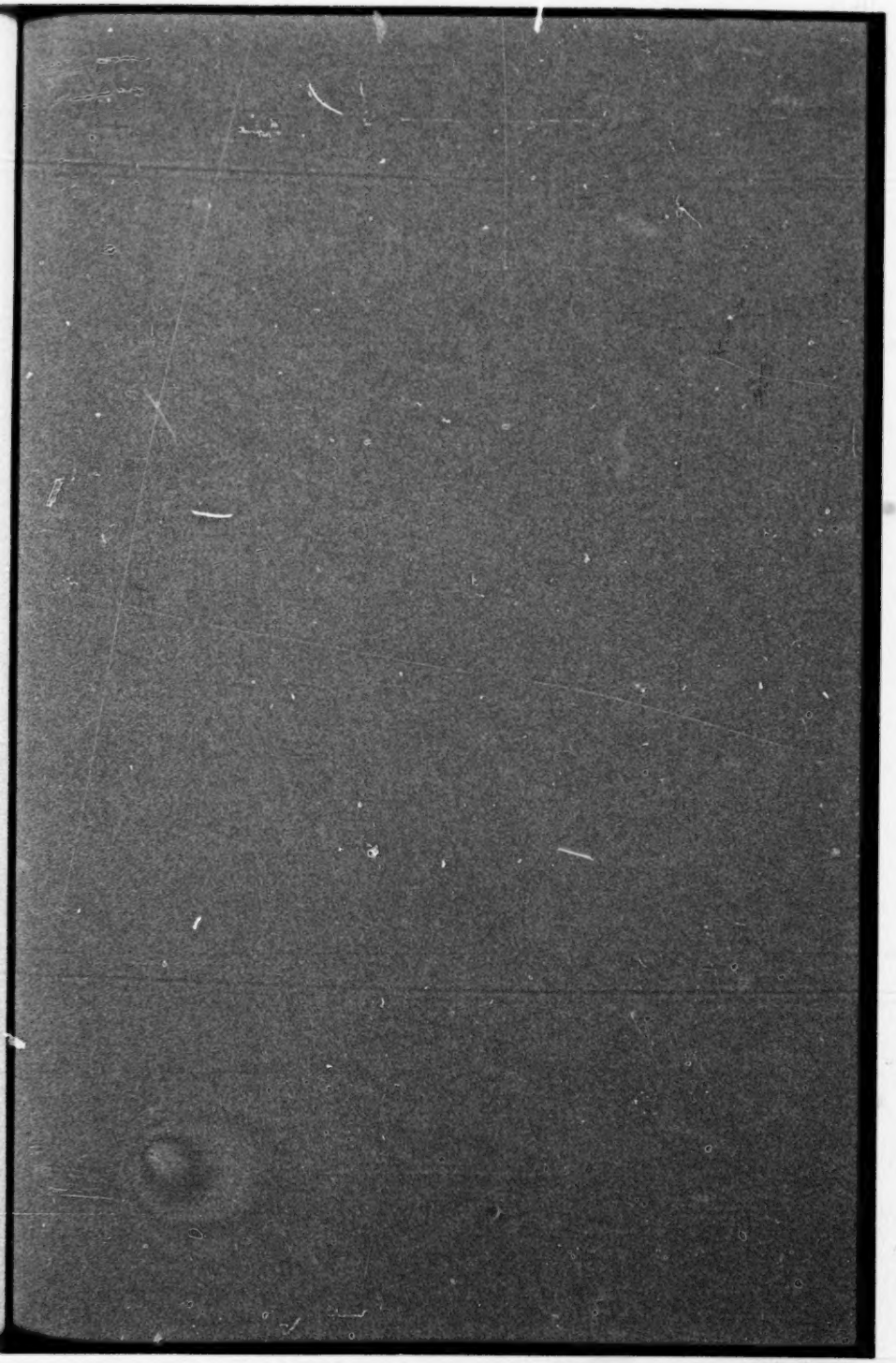

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1229

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-67a) is reported at 503 F.2d 1250. The opinion and order of the Federal Communications Commission (Pet. App. 1b-51b) are reported at 46 F.C.C. 2d 413. The related opinion and order of the Commission in *Specialized Common Carrier Services* is reported at 29 F.C.C. 2d 870.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1c) was entered on September 11, 1974. A petition for rehearing was denied on October 30, 1974 (Pet. App. 1d). The petition for a writ of certiorari was filed, pursuant to an extension of time granted by Mr. Justice Brennan, on March 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission was required to give American Telephone and Telegraph Company an evidentiary hearing in either (a) a proceeding to determine the nature of AT&T's interconnection obligation under a prior order of the Commission or, (b) a rulemaking proceeding to determine whether new entry into private line communications is in the public interest and what means of local distribution should be provided to make new entry effective.

2. Whether AT&T was provided with sufficient notice during the rulemaking proceeding that the Commission might issue an order which would require AT&T to provide other carriers with the same interconnections for Foreign Exchange and Common Control Switching Arrangement Service which AT&T provides to its Long Lines Department.

3. Whether the Communications Act authorizes a carrier unilaterally to abrogate a contract for service which may be provided pursuant to a contract by filing a tariff which is inconsistent with the terms of the contract.

STATEMENT

Telephone companies in the United States provide two general types of communications service: public and private line. The former consists primarily of voice communication service from and to all points on an integrated national and international telephone network, available to the public generally. The public telephone system allows a subscriber to reach any other subscriber over a circuit established for the purpose of the call. Ordinary long distance toll service and wide area telephone service (WATS) are common forms of public telephone service.

Private line service, generally sold to large users of communication, provides such customers "with full-time private circuits for the transmission of communications between locations specified by the customer. The service operates to give the customer continuous communication without requiring the carrier to establish a new connection for each call or message" (Pet. App. 7a, n. 3). Such services are often utilized for data and other nonvoice traffic. Private line services range from simple point-to-point communication to more complex services, such as foreign exchange ("FX") and common control switching arrangement ("CCSA") which require interconnections through the telephone network.[1]

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[1] The Commission, in language adopted by the court of appeals (Pet. App. 10b, n. 5; 7a, n. 4), defines FX and CCSA as follows.

> "Foreign exchange (FX) is a private line service that is partially 'switched'. It allows a businessman located in

Until 1969, most interstate private line service was provided by AT&T.[2] Private line services were also provided by Western Union and a few small carriers, but the public was then "primarily dependent upon AT&T for the provision of communications services, including specialized services." *Specialized Common Carrier Services*, 29 F.C.C. 2d 870, 913, n. 36.

In 1969, the Commission authorized Microwave Communications, Inc. ("MCI") to provide point-to-point microwave services between Chicago and St. Louis. *Microwave Communications, Inc.*, 18 F.C.C. 2d 953. Since MCI proposed only to provide trans-

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one state to, in effect, maintain a local phone in another state. Under FX, for example, a businessman in Washington can be reached by telephone subscribers in New York City and can himself reach New York City telephone subscribers (through a local loop in Washington, a Washington-New York interexchange line, and a business line in the New York City exchange area). However, New York City telephone subscribers could not reach Washington subscribers other than the Washington businessman over FX private line service and the latter would have to maintain a separate telephone in order to tie into the Washington exchange area.

"A Common Control Switching Arrangement (CCSA) is a private line system for linking the various offices of a large company through large switches on a local telephone company's premises instead of through PBX switches on the customer's premises. The private line circuits furnished in CCSA are provided for the exclusive use of the CCSA customers. However, the switching machines are shared with other private line service customers."

[2] The term AT&T as used herein includes American Telephone and Telegraph Company and the Bell System affiliates.

mitter-to-transmitter service, it was necessary to interconnect MCI customers with MCI's microwave terminals through AT&T facilities. AT&T initially refused to interconnect, claiming that such interconnection would harm its system. However, the Commission found that AT&T had offered no evidence to support its claims. *Microwave Communications, Inc.*, 21 F.C.C. 2d 190, 193.

The decision to grant the initial MCI application led to an influx of applications to the Commission for authority to provide a variety of interstate private line services. The Commission received approximately forty applications concerning more than 1,700 microwave station licenses. Rather than initiating hearings as to each application, the Commission decided to conduct a rulemaking proceeding to explore the common policy issues presented by these applications. See *Specialized Common Carrier Services*, 24 F.C.C. 2d 318, 350-352. Interested parties were invited to comment on whether entry of additional competing carriers providing private line service would serve the public interest. They were also asked to discuss, with particular attention to technical issues, the appropriate means for local distribution of the proposed services. *Id.* at 327, 349.

After a lengthy proceeding, the Commission found that existing carriers have not provided private line service with the diversity and flexibility the public interest required. *Specialized Common Carrier Services*, 29 F.C.C. 2d 870, 907-909. It concluded that "a general policy in favor of the entry of new car-

riers in the specialized communications field would serve the public interest * * *." *Id.* at 920. The Commission also addressed the local distribution question and declared "that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier." *Id.* at 940. The Commission added that "where a carrier has monopoly control over essential facilities, we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors." *Ibid.*

The National Association of Regulatory Utility Commissioners and the Washington Utilities and Transportation Commission sought review of the Commission's decision in the Court of Appeals for the Ninth Circuit. AT&T did not intervene in that case and did not file a review petition of its own. The Ninth Circuit unanimously affirmed the Commission's action on January 20, 1975. *National Association of Regulatory Utility Commissioners* v. *Federal Communications Commission and U.S.A.*, and *Washington Utilities and Transportation Commission* v. *Federal Communications Commission and U.S.A.*, Nos. 72-1198 and 71-2919.

In the summer of 1973, MCI advised the Commission that AT&T was refusing to interconnect with MCI for the provision of services which the AT&T Long Lines Department provides to its private line customers through interconnection with Bell System operating companies (Pet. App. 11a). AT&T advised the Commission that it had no intention of participating in a "through service" with MCI or any other private line carrier (Pet. App. 12a). By letter order dated October 4, 1973, the Commission Chairman stated that AT&T is obligated under the *Specialized Common Carrier Services* decision to provide "interconnection [of such exchange] facilities [as] required by [the specialized] carriers to terminate the services which such carriers have been duly authorized in the public interest to provide and to eliminate any favored treatment of an affiliated or other competing carrier (Pet. App. 13a).

MCI then requested further clarification because some AT&T affiliates had declined to provide some forms of interconnection. The Chief of the Common Carrier Bureau sent a letter to AT&T advising it that MCI is entitled to obtain interconnection to provide FX, CCSA and two other types of private line service (Pet. App. 14a). AT&T sought review by the full Commission, claiming that it is not required to provide those particular services under the order in the *Specialized Common Carrier Services* decision or the October 4 letter order. On December 13, 1973, the Commission initiated a proceeding to determine the lawfulness of AT&T's actions. *Bell System Tariff*

Offerings, 44 F.C.C. 2d 245 (A. 130).[3] AT&T was directed to address the question whether "the Commission has heretofore ordered the telephone companies * * * to provide interconnection with MCI" and, if so, "the scope of that order or rule or regulation with particular reference to interconnection for FX and CCSA services of MCI * * *" (A. 140).

AT&T subsequently requested the Commission to hold a trial type hearing. The Commission rejected that request because "[n]o specific factual allegations [had been] advanced in support of [AT&T's] intimation of dire consequences from interconnection as to indicate the presence of significant unresolved factual questions" (A. 860).

In the meantime AT&T filed tariffs with the Commission describing the facilities which AT&T will make available to other communications carriers and the rates for such services. These included services which AT&T had long provided to Western Union under "exchange of facilities" contracts which had been filed with the Commission. The tariff rate was substantially higher than the contract rate. The AT&T-Western Union contracts provided for termination on five years' notice, and AT&T had given notice in September 1973, of its intention to terminate the contracts. The Commission's order of December 13, 1973, also directed AT&T to show cause why it should not be ordered to cease and desist from

[3] "A." refers to the Appendix in the court of appeals.

altering the provisions of the exchange of facilities contracts with Western Union (A. 139).

On April 23, 1974, the Commission issued an order directing AT&T to furnish MCI and other specialized common carriers interconnection facilities "essential to the rendition of all of their presently or hereafter authorized interstate and foreign communications services" including interconnecting into a telephone company's local exchange facilities for the purpose of providing FX and CCSA service (Pet. App. 45b). The Commission also rejected tariffs filed by AT&T insofar as the tariffs "include interconnection facilities and services covered by the Bell-Western Union exchange of facilities contracts * * *" (Pet. App. 47b).[4] The Commission concluded that its prior orders did encompass interconnection for FX and CCSA services. The Commission stated that AT&T's interpretation would be inconsistent with the basic purposes and objectives of those orders because "our action was taken to insure that competition in the provision of interstate private line communications services would be on a full, fair, and nondiscriminatory basis and that the specialized common carriers would not be excluded from that market by reason of the monopoly control by Bell and other telephone companies over local distribution facilities" (Pet. App. 24b).

On petition for review, the court of appeals unanimously affirmed the Commission order of April 23,

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[4] The Commission reserved for a separate investigation the determination of the validity of other portions of the tariffs (Pet. App. 39b-40b).

1974 (Pet. App. 1a-67a). The court concluded that the "show cause" proceeding cannot be viewed as an independent proceeding which resulted in an initial decision to order AT&T to furnish interconnection services for FX and CCSA. The Commission had "created in AT&T a duty to provide the specialized carriers with FX and CCSA" in *Specialized Common Carrier Services* and accordingly the show cause proceeding was "a device for enforcing previously articulated responsibilities * * *" (Pet. App. 26a, 18a-26a).

The court of appeals also held that the Commission was entitled to impose interconnection obligations in the rulemaking proceeding. It rejected AT&T's argument that Section 201(a) of the Federal Communications Act, 48 Stat. 1070, 47 U.S.C. 201(a), requires an evidentiary hearing for all proceedings which result in an interconnection order (Pet. App. 28a-31a); it held that the notice of proposed rulemaking provided AT&T with adequate notice that interconnection might be required (Pet. App. 36a-39a); and it held that AT&T has not alleged factual issues which require an evidentiary hearing (Pet. App. 35a).

The court of appeals also affirmed the Commission's rejection of the tariff which purported to supersede Western Union's contractual rights. The court held that under the Communications Act carriers are not prohibited from ordering their business relations with other carriers by contract as well as by tariff, that the agreements between AT&T and

Western Union are permissible, and that nothing in the Communications Act authorizes one party unilaterally to abrogate contracts properly made (Pet. App. 53a-63a).

ARGUMENT

1. AT&T's contention that it was entitled to an evidentiary hearing in the proceeding which resulted in the order of April 23, 1974, to provide interconnections for FX and CCSA service reflects a misconception of the nature of that proceeding. The primary purpose of the proceeding was to determine whether the Commission had already required AT&T to provide interconnections for FX and CCSA services in the prior rule-making proceeding.[5] The Commission rejected AT&T's interpretation of the final order in the *Specialized Common Carrier Services* proceeding, and the court of appeals concluded that the Commission had correctly interpreted its own order.

The interpretation of an administrative rule or order presents a legal rather than a factual question. AT&T was provided with an adequate opportunity to brief and argue its contention that the prior order did not cover FX and CCSA services. When the interpretation question was resolved, no factual ques-

[5] The "show cause" order did state that the Commission would consider whether AT&T should be required to provide FX and CCSA interconnections if it concluded that the prior order did not cover such services. However, the Commission did not have to reach that question because it found such interconnections were required by the prior order.

tions remained for resolution. AT&T does not dispute that it had in fact refused to provide such interconnections to carriers offering competing private line services while requiring local Bell System operating companies to provide such interconnections for private line services offered by AT&T's own Long Lines Department.

To the extent that AT&T is contending that the Commission should not have proceeded by rulemaking in the earlier proceeding, its collateral attack upon the prior order is not well founded. This Court has often recognized that regulatory agencies must have the flexibility to act either by general rule or by adjudication. *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194. The Commission, having spent several years adjudicating MCI's hotly contested application for Chicago-St. Louis private line service, and being faced with dozens of new applications by different firms, decided to proceed to rulemaking in determining whether to open AT&T's near monopoly in private line service to competition and in selecting the means of insuring that new competitors would obtain local distribution. That procedure was appropriate for the common policy questions which confronted the Commission and presented AT&T a fair opportunity "to dissuade the FCC from ordering FX and CCSA interconnection * * * and was afforded the opportunity to present its arguments against the proposed interconnection" (Pet. App. 36a, 21b-22b).

AT&T argues, nonetheless, that the Commission cannot adopt any rule requiring interconnection without conducting an evidentiary hearing because Section 201(a) guarantees an "opportunity for hearing" prior to interconnection. However, this Court's decisions in *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, and *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, make it clear that the statutory phrase "opportunity for hearing" does not necessarily mandate an evidentiary hearing. Petitioners cite no legislative history showing congressional intent to require such hearings under Section 201(a). And the prior Commission decision cited by petitioners (Pet. 21) does not bind the Commission to one form of proceeding, when administrative procedural flexibility is necessary to deal with new developments in a fast changing field. *National Labor Relations Board* v. *Bell Aerospace*, *supra*; and see *Phillips Petroleum Co.* v. *Federal Power Commission*, 475 F.2d 842 (C.A. 10), certiorari denied *sub nom. Chevron Oil Company* v. *Federal Power Commission*, 414 U.S. 1146.

Alternatively, AT&T contends that, even if evidentiary hearings are not required in all interconnection cases, general principles of administrative law require an evidentiary hearing to resolve disputed facts concerning the "threat to its operational capacity" from FX and CCSA interconnection (Pet. 20, 24-25). However, AT&T has never demonstrated that its newly-discovered concern that interconnection for FX and CCSA might harm the technical efficiency

of the switched network system has sufficient basis to warrant an evidentiary hearing. While AT&T was alleging that interconnection of outsiders with Bell system operating companies to enable them to provide FX and CCSA service might harm the operation and maintenance of AT&T's switched network, AT&T was interconnecting with various independent telephone companies for those very services (Pet. App. 27b). AT&T did not present any data indicating that such interconnections with different companies have produced any problems, even though it would possess any data which may exist. AT&T merely asserted that the independent telephone companies "are partners with the Bell companies, not competitors. Joint arrangements work satisfactorily among partners, but not among competitors" (A. 228, fn.). However, specialized carriers offering private line services have every incentive to avoid any action which would jeopardize the technical efficiency of the system on which they depend for local distribution.

AT&T's presentation, as the court of appeals recognized (Pet. App. 35a), was akin to that described in *American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F.2d 624 (C.A.D.C.), certiorari denied, 385 U.S. 843: "a broad conceptual demand for an adjudicatory-type proceeding," without any proffer of relevant proof or lines of cross-examination. *Id.* at 633. And it had these grave weaknesses, despite the fact that AT&T was in the best position to present specific proof, if any existed (Pet. App. 35a). Moreover, AT&T could ease its generalized anxiety

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over future harm by imposing, as the court noted, "reasonable conditions for their [specialized carriers'] use of AT&T's switched network" (Pet. App. 35a).[6] It is "the kind of issue where a month of experience will be worth a year of hearings." *American Airlines, Inc.* v. *Civil Aeronautics Board, supra*, 359 F. 2d at 633.[7] The court of appeals' judgment was entirely consistent with precedent and based on sound common sense.[8]

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[6] The Commission has recently accepted an agreement between AT&T and other carriers including MCI which includes provisions with respect to the mechanics of, and rates for, interconnection for FX and CCSA services. See *In The Matter of American Telephone and Telegraph Company*, FCC Docket No. 20099, FCC 75-450, released May 7, 1975.

[7] Since the initial MCI proceedings, which were evidentiary, took six years to complete, AT&T's present request for an evidentiary hearing "is at least consistent with, though we do not say it is attributable to, a desire for protracted delay." *American Airlines, Inc.* v. *Civil Aeronautics Board, supra*, 359 F.2d at 633.

Moreover, the Commission stated: "When and if a claim of possible damage to the telephone system in a particular case is presented to the Commission by Bell, properly supported by engineering statements or other data, we shall of course determine the question on the basis of the pleadings and evidence submitted" (Pet. App. 29b). AT&T has yet to make any such presentation.

[8] Contrary to petitioners' contention (Pet. 24), the court of appeals did not "decline to follow" *Appalachian Power Co.* v. *Environmental Protection Agency*, 477 F.2d 495 (C.A. 4), on this issue. And as indicated above, the court of appeals properly held that AT&T had not raised any relevant disputed issue of fact meriting an evidentiary hearing.

2. AT&T also contends that it was not afforded adequate notice in the rulemaking proceeding that interconnection for FX and CCSA might be required (Pet. 26-32). Although it is not entirely clear, AT&T appears to advance two distinct claims: That in the rulemaking itself, the Commission failed to give adequate notice that it would deal with FX and CCSA interconnection (Pet. 27); and that the Commission erred in the show cause proceeding in concluding that it had required FX and CCSA interconnection in the rulemaking (Pet. 28-32).

The court of appeals correctly rejected the first contention, concluding that the Notice of Proposed Rulemaking was sufficient to place AT&T on notice that the inquiry encompassed all private line service offerings, including FX and CCSA (Pet. App. 37a-39a). The court noted that the Notice contained a computation of AT&T private line revenues which might be subject to diversion, and that the computation obviously included AT&T revenue from FX and CCSA services (Pet. App. 38a). Moreover, the Notice stated that the Commission will not condone any practice whereby a carrier with monopoly control over essential facilities discriminates in favor of an affiliated carrier. As the court of appeals pointed out (Pet. App. 39a): "If this passage connotes nothing else, it indicates that the Commission intended the established carriers to provide to the specialized carriers the same services (at the same rates) as those provided to AT&T's affiliates" (Pet. App. 39a).

AT&T nonetheless claims it was misled with respect to the scope of the rulemaking proceeding because MCI "described its system as involving only 'point-to-point' private line service connecting its customers' premises and expressly stated that no 'switching between customers is involved'" (Pet. 27). However, a particular carrier's description of its present plans, though surely a matter of interest to the Commission, does not establish the scope of a rulemaking inquiry; the agency sets the terms. *Pacific Coast European Conference* v. *United States*, 350 F.2d 197, 205 (C.A. 9), certiorari denied, 382 U.S. 958.[9]

AT&T also asserts that various statements in other proceedings by Commission attorneys and by the court of appeals indicate that the final order in the rulemaking proceeding did not clearly cover FX and CCSA services (Pet. 28-32). This contention, though cloaked in the language of notice, in reality only restates the argument advanced earlier that the Commission erred in regarding the rulemaking as covering FX and CCSA services (see pp. 9-12, *supra*). And, as shown earlier, it is insubstantial in light of the Commission's careful examination of its prior

[9] AT&T also claims it was misled because the Commission expressly mentioned local loops and did not mention other forms of interconnection. In view of the broad language of the notice AT&T could not reasonably assume that the Commission would not authorize other carriers to provide all forms of private line services and require existing carriers to provide all necessary interconnections. Indeed, the notice's computations of possible revenue diversions from AT&T were based upon AT&T's total revenues from all private line services including FX and CCSA.

proceedings (Pet. App. 9b-25b) and the affirmance of that examination by the court of appeals (Pet. App. 17a-25a). In any event, the fragments which AT&T has culled from other proceedings do not support its claim. AT&T places great emphasis on statements in respondents' brief in *National Association of Regulatory Utility Commissioners* v. *Federal Communications Commission and U.S.A.*, and *Washington Utilities and Transportation Commission* v. *Federal Communications Commission and U.S.A.*, C.A. 9, Nos. 72-1198, 71-2919, decided January 20, 1975, which may seem to characterize the rulemaking order as having dealt only with interconnections through local loops (Pet. App. 1f). The statements were made in a case in which the petitioners did not raise any interconnection issue, and the court of appeals in the present case correctly held that any such characterization was "unintentional" (Pet. App. 19a, n. 12). The Commission's statement to the Second Circuit that it "could rule that it was never its intention to allow MCI to provide 'FX' or 'CCSA' service * * *" (Pet. 28) is nothing more than a restatement of the Commission's own formulation of the issues in the then pending show cause proceeding (see Pet. App. 5b) and was made in the context of a suggestion that review of the October 4 letter order be deferred until the Commission reexamined the question.

AT&T's reliance upon the Third Circuit's decision to vacate a district court order directing AT&T to furnish interconnections for FX and CCSA service

is also unpersuasive. The district court issued a preliminary injunction a few days after the Commission issued its "show cause" order of December 13, 1973. The court concluded: "In the *Specialized Common Carrier* decision in Docket 18920, the F.C.C. had before it for consideration the full range of private line services and it contemplated competition by the newly authorized carriers in the provision of *all* those services." *MCI Communications Corp.* v. *AT&T*, 369 F.Supp. 1004, 1014 (E.D. Pa.). The Third Circuit vacated the district court order on primary jurisdiction grounds. *MCI Communications Corp.* v. *AT&T*, 496 F.2d 214. It concluded that the district court should not have acted until the Commission interpreted its own order. The Third Circuit opinion in that case thus did not reject the district court's conclusion that *Specialized Common Carrier Services* "required AT&T to provide FX and CCSA to the specialized carriers" (Pet. App. 25a).

In sum, AT&T has not presented any substantial question with respect to the adequacy of the notice in the rulemaking proceeding or the correctness of the Commission's interpretation of its rulemaking order which warrants review by this Court.[10]

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[10] The petition also states that if certiorari is granted, AT&T may present two other questions: Whether the order is substantively invalid under *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, and whether it is "impermissibly over-broad * * * in seeking to impose an undefined obligation with respect to unknown services which specialized carriers may hereafter offer" (Pet. 4, n. 4). These contentions are insubstantial. The public interest findings in *Specialized Common Carrier Services*

3. Contrary to AT&T's assertion, the decision below affirming the Commission's rejection of a tariff which purported to abrogate the AT&T-Western Union contract does not conflict with *Armour Packing Co.* v. *United States*, 209 U.S. 56, or *Cincinnati, N. O. & T.P.Ry.* v. *Chesapeake & O. Ry.*, 441 F.2d 483 (C.A. 4) (*"CNO"*). The court of appeals correctly determined that this case is more analagous to *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348.

In *Armour* the United States prosecuted a shipper for a criminal violation of the anti-rebate provision

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are fully consistent with *Federal Communications Commission* v. *RCA Communications, Inc.*, for the reasons stated in the Ninth Circuit opinion affirming that order and in the decision below.

The Third Circuit determined in the present case that the obligation to render interconnections for subsequently authorized services must be read in context as requiring AT&T to furnish those interconnection "elements of private line services which AT&T supplies to its affiliates and furnishes to customers through its Long Lines Department" (Pet. App. 46a). Such a requirement is not overbroad. Indeed, it is probably no broader than AT&T's statutory obligation to refrain from making "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service" or giving "any undue or unreasonable preference or advantage to any particular person, class of persons, or locality * * *." Section 202(a) of the Communications Act, 47 U.S.C. 202(a). See also *American Trucking Ass'n* v. *A.T. & S.F.R. Co.*, 387 U.S. 397, 407, in which this Court stated: "The fact that the person tendering traffic is a competitor does not permit the railroad to discriminate against him or in his favor." Cf. *United States* v. *Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383.

of the Interstate Commerce Act, alleging that the shipper had knowingly received transportation service for less than the published tariff rate. The shipper claimed it was entitled to the lower rate under a contract which was executed at the former tariff rate before the railroad published a higher tariff. This Court declared that the anti-rebate prohibition does not contain any "provision excepting special contracts from the operation of the law." 209 U.S. at 81. The Court also observed that the Interstate Commerce Act does not contain any provision for filing contracts with shippers and declared: "If the shipper sees fit to make a contract covering a definite period for a rate in force at the time he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute * * *." *Id.* at 82.

In *United Gas* and *Sierra* this Court held that the Federal Power Commission should have rejected tariffs which purported to supersede prior contracts. The Natural Gas Act and the Federal Power Act, at issue in those cases, permitted the establishment of rates either by contract or by tariff. The Court concluded that those statutes do not authorize the regulated company unilaterally to abrogate such a contract by filing a tariff specifying a different rate.

The Third Circuit concluded that the Communications Act also permitted AT&T to proceed either by contract or by tariff in leasing facilities to Western Union. Thus, the statutory scheme with respect to these particular rates is analogous to the statutory

scheme in the *United Gas* and *Sierra* cases. Unlike *Armour*, it does not involve a rate which must be set by tariff.

The *CNO* decision is entirely consistent with this dichotomy between rates which must be set by tariff and rates which may be set by contract in lieu of tariff. Although the Interstate Commerce Act permits railroads to enter into many inter-carrier arrangements by agreement, the Fourth Circuit concluded that the service in question was one which must be provided under a tariff. It stated that that service, the return of misrouted freight cars, is a "transportation service" within the meaning of Section 6(7) of the Interstate Commerce Act, 24 Stat. 380, 49 U.S.C. 6(7), and thus lawfully performable not under contract but under tariff. 441 F.2d at 487. That court did not hold that a railroad would be entitled to abrogate a permissible contractual arrangement by filing a non-mandatory tariff which is inconsistent with the contract terms.

AT&T does not claim that the Third Circuit erred in concluding that the lease of facilities to Western Union could lawfully be done by contract as well as by tariff.[11] Any other conclusion would necessarily mean that AT&T continuously violated the

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[11] The Communications Act plainly contemplates that carriers may make a wide variety of contracts with other carriers, including contracts touching on rates. Section 211(a) compels the filing with the Commission of all contracts by a carrier with another carrier and the AT&T-Western Union contracts were in fact filed with the Commission.

Communications Act from 1934 to 1973. AT&T furnished leased facilities to Western Union throughout that period even though it had no tariff on file covering such lease arrangements.

The *CNO* decision was also based upon an alternative holding that the validity of the tariff could not be challenged in that proceeding. The question had arisen in a suit by CNO to collect amounts due under the published tariff. The other railroads asserted that the tariff was invalid because it conflicted with a prior contract. The Fourth Circuit declared that a "tariff, so long as it is in effect, must be treated as though it has the force of law." 441 F.2d at 488. That court noted that the ICC had refused to suspend the tariff, and courts have no power to suspend a railroad tariff. It stated: "Instead of pursuing the administrative remedies which the Commission expressly reserved, the railroads opposing the tariff abandoned the Commission as a forum, ignored the tariff, and awaited the inevitable suit that the CNO was required by law to file for the collection of its tariff." *Id.* at 489.

That alternative holding is, of course, an application of the primary jurisdiction rule established in *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426. There is no primary jurisdiction question in this case. The validity of the AT&T tariff was challenged in the appropriate administrative forum. The question of the validity of the tariff arose in administrative proceedings in this case as it did in *United Gas* and *Sierra*. The court of appeals cor-

rectly concluded that the agency was required to reject the tariff because the Communications Act is comparable to the Natural Gas Act and the Federal Power Act in that it does not authorize unilateral abrogation of contracts which are permissible under the statutory scheme.[13]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1975.

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[13] As noted earlier (see n. 6, *supra*), AT&T and the newly authorized carriers providing private line service have negotiated an agreement concerning rates for FX and CCSA service which has been accepted by the Commission.

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No. 74-1229

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.

This reply is submitted by petitioners AT&T *et al.* in response to the oppositions to certiorari filed by the respondents the FCC and the United States, MCI, Southern Pacific and Western Union.

I. This Case Warrants Plenary Review Because the Legal Issues Are Important and Recurring and There Are Conflicts Between the Decision Below and Decisions of This Court and Other Circuits.

In responding to AT&T's certiorari petition, the Government and several respondents supporting its

opposition to certiorari make a melange of claims that are discussed in greater detail below. However, there are several basic considerations that deserve attention at the outset and confirm that the issues on their face are sufficiently grave, consequential and subject to conflicting precedent as to warrant plenary review by this Court.

First, it is clear that the FCC here ordered the Bell System to physically connect specialized carriers into the nationwide switched telephone network without ever accepting and evaluating *evidence* as to the operational and economic impact of this course in *any* type of proceeding. Such a procedure conflicts with principles recognized by other courts of appeals (AT&T Pet. 24-25) and is inconsistent with the FCC's own past practice under the governing statute. *Id.* at 21. The refusal to accept and consider facts is not justified by this Court's decision in *Florida East Coast Ry.* —where factual data was accepted by the ICC—even if the agency proceeding below in this case were (inaccurately) described as a rulemaking. See pp. 5-7, below.

Second, in taking this summary action requiring FX-CCSA physical connection the FCC relied heavily, although not exclusively, on its earlier *Specialized Carrier* decision. Yet, it is indisputable that neither in the notice commencing that earlier proceeding nor in the decision itself was there any specific mention of FX-CCSA physical connection or any discussion of the consequences of allowing specialized carriers to be connected directly into the switched network on which the public relies for its essential telephone services. The FCC's action in this case plainly raises a

substantial question under the fair-notice principle of *Morgan* v. *United States,* 304 U.S. 1 (1938).

Third, there is no dispute that two lines of Supreme Court precedent exist, one under the Interstate Commerce Act and one under the Natural Gas Act, which reach different results on the important question whether a tariff change overrides a pre-existing, inconsistent contract. Under the Interstate Commerce Act, on which the Communications Act was modeled, the tariff indisputably does override the contract to assure uniform treatment to all users. *Armour Packing Co.* v. *United States,* 209 U.S. 56 (1908). The lower court's failure to follow *Armour* clearly warrants review.

In short, this case is a classic example of one warranting certiorari under established principles. The issues bear upon the operation of the switched telephone network and have great practical importance; there are manifest conflicts between the decision below and principles established by this Court and by other courts of appeals; and the issues raised are unquestionably recurring ones in the administrative process.

II. The Evidentiary Hearing Issue Presents a Recurring Question of Administrative Law on Which the Circuits Are Divided.

AT&T contended below and in its petition here (pp. 18-25) that it was entitled to an evidentiary proceeding in which facts could be tested and weighed before FX-CCSA physical connection was ordered. It showed that this course was required not only by statutory language and past administrative practice but by the more basic principle, followed by other courts of appeals, that an agency taking far-reaching measures in-

volving complex and factually related issues must accept and evaluate evidence, however the proceeding may be denominated.

The Government's first response is to contend that the FCC's decision below involved nothing more than the "interpretation" of an earlier administrative order so that the case was necessarily concluded when the "legal" question of interpretation was resolved. Gov. Br. 11-12. This is manifestly an inaccurate description of what the FCC did and said in this case. The FCC's own decision shows that it here purported to consider —or, as it alleges, reconsider—whether FX-CCSA physical connection should be ordered, and it resolved that question on the merits contrary to the Bell System—although without affording any opportunity to introduce, weigh or test evidence bearing on this issue.

Thus, the FCC stated that "[i]n this proceeding, therefore, we are again reviewing the question of interconnection." Pet. App. 26b. It stated that in this case it was giving "careful consideration" to the arguments for and against FX-CCSA physical connection and had reached the view that its objective "requires the issuance of broad interconnection orders." *Id.* The FCC decision then devoted paragraphs of discussion, without any evidentiary foundation, to the technical and operational considerations raised by FX-CCSA physical connection. *Id.* at 26b-31b.

Consequently, there is no question that the FCC did purport to consider and resolve in this proceeding the issue of FX-CCSA physical connection. Although it sought to draw support from its earlier general statements in the *Specialized Carrier* case, much of its present decision would be wastepaper if it were—as

the Government's brief now asserts—merely an interpretation of a prior order.[1] Having purported to determine (and/or redetermine) the issue of FX-CCSA physical connection on the merits in this case, the FCC's order must be justified in terms of what it actually said and the procedures it actually employed. *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943).

The Government's second contention is that under *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973), the Commission is entitled to use rulemaking to require physical connection without conducting an evidentiary hearing. Gov. Br. 13. See also MCI Br. 19, SP Br. 9. This argument ignores both the statutory language authorizing physical connection "orders" and the evident fact that, even if rulemaking were permitted, the FCC here proceeded through an adjudicatory show-cause proceeding and not through rulemaking. See AT&T Pet. 19-23.[2] Much more important, whatever label proceedings may be given, *Florida*

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[1] The "prior order" argument is additionally defective because in the prior proceeding the FCC did not issue any interconnection order to AT&T, even to provide loop service (see 29 F.C.C. 2d at 938-41), which involves no physical connection with the switched network (18 F.C.C. 2d at 953-54 (quoted AT&T Pet. 6)). How the FCC's present proceeding could have confined itself merely to the "interpretation" of an interconnection order never previously issued is a point the Government's brief does not explain.

[2] The statute involved in *Florida East Coast* expressly provided for rulemaking (410 U.S. at 225), whereas Section 201(a) of the Communications Act contemplates "orders . . . in cases" requiring physical connections between carriers based upon findings that such action is "necessary or desirable in the public interest." The legislative background of Section 201(a) (AT&T Br. 20) and the FCC's own prior construction (*id.* at 21) support the view that adjudicative orders and not rules were the intended means of requiring physical connections.

East Coast does not authorize an agency even in avowed rulemaking proceedings to ignore evidence and resolve factually related issues in ignorance of the facts; and the lower court's misconstruction of that decision (Pet. App. 32a) itself reinforces the need for review.

Florida East Coast involved not only an explicit determination by Congress to authorize rulemaking but an agency proceeding in which evidentiary *data* was in fact accepted from the parties before a decision was reached. 410 U.S. at 231. That case in no way involved a complete refusal of an agency to receive evidence and cannot support the FCC's action in this case. What the Government fails to note is that the actual issue in *Florida East Coast* was simply whether submissions could be confined to written presentations (410 U.S. at 226)—a form in which the ICC frequently accepts evidence even in adjudicatory proceedings (see 49 C.F.R. § 1100.51)—or whether oral hearings were also necessary.

Rulemaking, even where authorized, may permit the agency to simplify the form of submitting evidence, curtail oral cross-examination, and avoid confining itself solely to record evidence, but it does not mean (as the Government seems to assume) that the agency can simply refuse to accept evidence altogether. Where rulemaking proceedings have presented factual issues within the experience and knowledge of the parties, acceptance and evaluation of evidence is integral to rulemaking proceedings.[8] Other courts of appeals—

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[8] Thus, the Administrative Procedure Act itself contemplates the receipt of "data" as well as "arguments" in "informal rulemaking" (5 U.S.C. § 553(c)) and, in "formal rulemaking," the APA

which the lower court in its own words "decline[d] to follow" (503 F.2d at 1264-66 (Pet. App. 28a-32a))—have repeatedly held evidentiary proceedings to be required in rulemaking where important issues were at stake and factual questions were presented. AT&T Br. 24-25.

American Airlines, Inc. v. *CAB*, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966), heavily emphasized by the Government (Gov. Br. 14-15), is an unfortunate decision from the Government's standpoint. There, in rejecting a demand for oral proceedings, the majority emphasized that the agency had accepted "written data" (359 F.2d at 626) and "rebuttal" (*id.*), and it noted that the petitioners seeking even more elaborate oral hearings had made no "specific proffer" of the subjects requiring such proceedings. *Id.* at 633. Compare pp. 1a-11a, below. Moreover, the court took special care to say that the agency action involved was not one which was "individual in impact"—as the present order clearly is—so that a claim of rulemaking would be only a masquerade. *Id.* at 631.[4]

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provides for the conventional submission of "evidence" in oral or documentary form including rebuttal and cross-examination except that (where prejudice will not result) the agency may provide for the submission of all or part of the "evidence" in written form. 5 U.S.C. § 556(d). The FCC is constantly receiving evidentiary data in rulemaking proceedings. *E.g.*, the computer rulemaking proceeding which, in response to highly factual notices of inquiry (7 F.C.C. 2d 11, 19), resulted in 3,000 pages of comments from sixty parties and numerous reports by a consultant firm (28 F.C.C. 2d at 291-92). See generally *GTE Service Corp.* v. *FCC*, 474 F.2d 724 (2d Cir. 1973).

[4] Even with these qualifications, the *American Airlines* decision represented a 4-3 *en banc* decision in which the three dissenters contended that the procedures were inadequate.

The last contention made by the Government to defeat AT&T's claim to an evidentiary proceeding is the claim that AT&T made no showing or proffer warranting a factual inquiry. Gov. Br. 13-15. In fact, the record clearly shows that AT&T submitted a lengthy description of the factual issues requiring examination and of pertinent facts it intended to prove in an evidentiary hearing (A. 224-33, 261-65). This was a specification vastly more detailed than the "issues" the FCC has itself described as warranting an evidentiary hearing in prior physical connection cases. AT&T Pet. 20. To resolve any further dispute on this point, the AT&T proffer and technical annex are reprinted at p. 1a *et seq.* of this reply.

The Government's argument that no showing of need was made not only ignores the detailed proffer but omits the circumstances in which it was considered. In denying AT&T's initial request for an evidentiary proceeding, the FCC asserted that it was "premature" (45 F.C.C. 2d at 262), and then turned about and issued a decision which discussed the very same issues of fact and resolved them against AT&T without ever receiving evidence on these now matured issues. Pet. App. 26b-31b. The very fact that the FCC's decision devotes paragraphs (*id.*) to discussing the allegedly non-existent operational and economic issues is the best evidence of all that these issues were very real indeed.

Even in this Court the Government's own brief finds it necessary, in explaining the FCC's result, to make factual arguments or assumptions on which AT&T specifically sought an opportunity to introduce contrary evidence. Thus, the Government asserts (pp. 14-15) that past experience with local telephone company

physical connection arrangements appears to have resulted in no problems and that the specialized carriers have "every incentive" to avoid any action that would jeopardize the technical efficiency of the switched network. Yet, AT&T specifically sought an opportunity to submit evidence on this very issue to show that existing arrangements were quite different and that specialized carriers had substantial incentives to operate in ways that would jeopardize the switched network. See pp. 3a-6a, 9a-11a, below.

III. The Lack of Fair Notice Raises a Basic Issue Respecting the Scope and Rationale of Morgan v. United States, 304 U.S. 1 (1938).

AT&T showed in its petition (pp. 26-32) that however the *Specialized Carrier* decision might now be read, at the time of that proceeding the fair notice required by *Morgan* was not given that the proceeding involved FX-CCSA or any other type of physical connection with the switched network. AT&T relied *inter alia* on the absence of any discussion of this subject in either the notice or decision in that earlier proceeding; on MCI's own pronouncements in the *Specialized Carrier* case that switched network connection was not sought; on the Government's own similar representation to the Ninth Circuit on review of the FCC's decision; and on the Third Circuit's own earlier conclusion that the decision was at the very least unclear.

The Government's first response seems to be that AT&T is arguing in whole or in part that the FCC has, in the present case, merely misinterpreted its prior decision. Gov. Br. 16-19. The Government then argues that the FCC's interpretation was a permissible one and was not strictly forbidden either by the absence

of any explicit discussion of FX-CCSA physical connection in the *Specialized Carrier* decision or by the affirmative representations in the proceeding and afterwards that switched network physical connection was not involved. The Government's response, like that of the lower court, simply fails to meet the argument that fair notice was not provided.

The Government appears to assume that AT&T's claim is answered so long as the agency's present interpretation of its earlier order is a permissible one in some abstract sense. The assumption is plainly wrong. The subsequent reinterpretation of the decision, even if it is otherwise within the bounds of agency power (which AT&T disputes), does not cure or even address an asserted deficiency in providing notice at the time the proceedings were originally held and the decision rendered. The very rationale of *Morgan* is to protect the right of a party "to be fairly advised of what the Government proposes" so that it may "be heard" in opposition "*before* [the Government] issues its final command." 304 U.S. at 18-19 (emphasis added).[8]

The Government's misconstruction of *Morgan* parallels that of the lower court in this case, which also

[8] It is the absence of any such notice that makes it ludicrous for MCI to assert in its opposition (pp. 7-10, 28) that AT&T was provided an opportunity to submit evidence in the *Specialized Carrier* case bearing on FX-CCSA connection and that AT&T failed to take advantage of this opportunity. Of course, there was no submission of evidence on this issue: AT&T never knew the subject was in issue, and MCI—which advised the FCC in that proceeding that "no switching between customers is involved" in its proposal (Comments of MCI Carriers, October 1, 1970, pp. 26-27, 102-03, 167-68)—is the last party in the world who should be heard to argue otherwise.

addressed itself to the issue of permissible interpretation but *not* to the issue of notice. AT&T Pet. 31. This misconstruction of *Morgan* presents a basic question concerning the scope and rationale of this Court's decision in that case; and the approach of the Government and lower court is inconsistent not only with *Morgan* but with the decisions of other circuits correctly applying its principle. AT&T Pet. 26, 30. The conflict is clearly a proper issue for certiorari.

The Government is no more persuasive in seeking to explain away the evidence on which AT&T relied to show that no fair notice was provided at the time of the *Specialized Carrier* decision. First, the Government brief simply fails to address the complete lack of any reference in that decision to FX-CCSA or any other type of physical connection with the switched network. Rather, the brief seeks to imply (pp. 3, 16) that FX-CCSA are merely minor variations on point-to-point private line service (and loop interconnection) which were in fact the actual objects of the specialized carriers' applications and the focus of the *Specialized Carrier* decision. The reality is that FX and CCSA are distinct hybrid services that, quite unlike point-to-point private line service, indisputably involve physical connection with the switched network.[6]

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[6] Ironically, in attempting to distinguish between the ordinary "public telephone system" and "private line service," the Government's brief (p. 3) provides a description or definition of the public telephone system in a way that—accurately but quite contrary to the Government's purpose—emphasizes the relationship between the switched network and FX and CCSA service. Thus, it describes the public telephone system, in contradistinction to private line service, as one which allows a subscriber to reach any other subscriber over a circuit established for the purpose of the call. This is *exactly* what FX service does (Gov. Br. 3 n.1); and CCSA is scarcely less related to the public telephone system since it utilizes

Next, referring to MCI's statements in the *Specialized Carrier* case disclaiming any intent to connect into the switched network, the Government's brief (p. 17) blandly asserts that the agency and not MCI defines the scope and terms of an FCC proceeding. What this ignores is that the *Specialized Carrier* proceeding was brought to consider the applications of specialized carriers as *they* defined their proposals. See 29 F.C.C.2d at 871-72. MCI was not only the principal applicant but, with one distinct and irrelevant exception, MCI was the very prototype of the specialized carrier applicants, and the FCC's decision both described and treated it in this manner. See *id.* at 874-76.

Then, the Government's brief (pp. 17-18) turns to the explicit representation of both the United States and the FCC in the Ninth Circuit that the applicants involved in the *Specialized Carrier* case "made clear that their facilities would not be connected with the interstate telephone network of AT&T . . ." (quoted at AT&T Pet. 10 and Pet. App. 1f). The Government explains this as an inadvertent mistake in a case where the petitioners "did not raise any interconnection issue." Gov. Br. 18. In fact, the representation—which was made at least twice in the Government's brief in the Ninth Circuit (Pet. App. 1f-2f)—was apparently a conscious response designed to assuage doubts the Ninth Circuit might otherwise have had about the failure of the FCC to provide more extensive proceedings to evaluate the possible adverse impact of the policies adopted in the *Specialized Carrier* decision.[7]

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common switching systems to provide CCSA interconnection. See AT&T Br. 9.

[7] The comparative spontaneity and the contemporaneous nature of the Government's representations in the Ninth Circuit reinforce

Finally, the Government asserts (p. 19) that there is no inconsistency between the Third Circuit's present reading of the *Specialized Carrier* decision and its earlier holding that, with respect to FX-CCSA physical connection, the scope of any such obligation under the *Specialized Carrier* decision was "so unclear" and involved such "uncertainty" and was so subject to "legitimate dispute" that the District Court's injunction had to be vacated. 496 F.2d at 221-24.[8] This is a repetition of the Government's basic misinterpretation of *Morgan*. The very fact that the FCC's earlier proceeding was (euphemistically) "unclear" as to whether it embraced FX-CCSA physical connection—and was unclear before, during and well after the decision—effectively refutes the suggestion that AT&T was given the fair warning required by *Morgan* that the FCC proposed to consider that important issue in that case.

What is conclusive evidence of this lack of fair notice is the utter absence of *any* direct discussion in the *Specialized Carrier* notice or decision of FX-CCSA physical connection or any other form of physical connection with the switched network. If switched net-

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their accuracy and make them far better reflections of what the *Specialized Carrier* decision actually determined than the involuted and painful explanation of that decision offered in the proceeding below.

[8] Similarly, the FCC itself conceded below, with extreme understatement, that its earlier decision "may not have been perfectly clear." Pet. App. 26b. The Government made the same concession in somewhat stronger terms to the Second Circuit in explaining that the FCC might conclude in the proceeding below that it had never addressed the issue of FX-CCSA physical connection in the *Specialized Carrier* case. AT&T Pet. 28.

work physical connection had in fact been an issue in that proceeding, it is inconceivable that every key document including the FCC's notice, the comments of the various parties including AT&T and MCI, and the briefs in the subsequent proceeding in the Ninth Circuit appeal—would have completely failed even to mention the issue.[9] The lack of any such specific discussion is, of course, consistent with the prior and subsequent affirmative representations by MCI and the FCC that switched network physical connection was not an issue.

IV. The Summary Tariff Rejection Conflicts with Decisions Both of This Court and of the Court of Appeals for the Fourth Circuit.

AT&T's petition (pp. 32-37) showed that under the Interstate Commerce Act it is well-established that a tariff filing overrides a prior inconsistent contract.[10] Under the Natural Gas Act, which "is in marked contrast to the Interstate Commerce Act," such tariff filings do not supersede preexisting contracts. *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 338 (1956). The third question warranting review here is whether

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[9] After what was undoubtedly the most diligent inquiry, the main scrap of evidence that has been adduced by the FCC to show that it did contemplate FX-CCSA physical connection is a brief and general *financial* computation in the *Specialized Carrier* case. Gov. Br. 16. The sentence in question does not refer either to FX-CCSA service or to physical connection with the switched network. Moreover, an examination of the sentence in context shows that the FCC was not addressing or contemplating FX-CCSA physical connection but was simply making the general point that most of AT&T's revenues derive from MTS and WATS service. Pet. App. 38a.

[10] *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908); *Cincinnati, N.O. & T.P. Ry.* v. *Chesapeake & O. Ry.*, 441 F.2d 483 (4th Cir. 1971); *Cruces Cable Co.*, 35 F.C.C. 2d 707, 708 (1972), *reconsideration denied*, 39 F.C.C. 2d 552, 554 (1973).

the lower court improperly disregarded the former line of authority and adopted the latter as the rule presently and hereafter to be followed in construing the Communications Act.

The Government's brief manages to avoid any reference to the overwhelming legal authority showing that the Interstate Commerce Act precedents are presumptively applicable to the Communications Act. The legislative history shows that the Communications Act was modeled directly on the Interstate Commerce Act; the two statutes have repeatedly been construed *in pari materia;* the rate and tariff provisions of the two statutes are virtually the same and both contrast with the provisions of the Natural Gas Act respecting contract-made rates; and the FCC itself recognized in the *Cruces Cable* case that the *Armour* doctrine applied to filings under the Communications Act. AT&T Pet. 33-35.[11]

Instead, the Government contends (p. 21) that the Communications Act parallels the Natural Gas Act, and is subject to its precedents, because both allow rates either "by contract or by tariff." This in no way distinguishes the Interstate Commerce Act: this Court in *Armour* did not suggest that there was anything un-

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[11] While the Government ignores *Cruces Cable,* Western Union's brief (p. 12) argues that the decision is distinguishable because the contract there involved contemplated that the tariff rate changes would automatically revise the contract rate. However, the FCC there stated, without qualification, citing *Armour,* that "it is well established that a carrier may unilaterally terminate a contract rate by publishing a tariff for a higher rate than that provided for in the contract." 35 F.C.C. 2d at 708. It then went on to state, simply as an alternative ground, that the contract "at least indicate[d]" that the complainant was aware that the rate was governed by the tariffs, not the contract, in the event of a change in tariff rates. *Id.*

lawful or impermissible about a contract establishing a rail transportation rate and, indeed, the Interstate Commerce Act, like the Communications Act, specifically provides for the filing of intercarrier contracts, in order to advise the agency of their existence. AT&T Pet. 36. As *Armour* made clear, its rationale was not that the making of the contract was unlawful but rather that the tariff change has priority over the contract in order to assure that tariffs will apply equally to all parties where a tariffed service is provided. 209 U.S. at 81-82.

The Government's statement that rates may be established by contract or tariff under both the Communications Act and the Natural Gas Act not only fails to distinguish the Interstate Commerce Act and *Armour* but it ignores the central distinction between the two former statutes bearing on the issue here involved. Under the Natural Gas Act, the critical rate provisions —suspension, substantive review of rates under the justness and reasonableness standard, and repayment of excessive rates—apply both to contract rates and to tariff rates. Under the Interstate Commerce Act and the Communications Act, only tariff-made rates are subject to these provisions, and it is thus the tariff rates which are the basic (and overriding) form of ratemaking mandated by both statutes.

The lower court's decision conflicts not only with *Armour* but with the *Cincinnati* case in which the Fourth Circuit recently applied *Armour* to an intercarrier contract under the Interstate Commerce Act. Devising a new ground to distinguish the Fourth Circuit decision (which understandably did not occur to the lower court), the Government now argues (p. 22) that the *Cincinnati* case is "entirely consistent" be-

cause "the Fourth Circuit concluded that the service in question was one which must be provided under a tariff." Since the FCC here *directed* AT&T to tariff its physical connection arrangements with other carriers and that directive led to the filing of the very tariffs here involved,[12] the Government's argument serves to confirm—rather than to distinguish—the application of the *Armour-Cincinnati* doctrine in the present case.

Western Union's brief largely parallels the Government's but adds the novel suggestion (pp. 18-19) that the FCC's summary rejection of the tariffs might be upheld on an entirely different ground having nothing to do with the inconsistency between the tariffs and the prior contracts. The ground was adopted neither by the Third Circuit, as Western Union admits (p. 19), nor by the FCC, contrary to Western Union's intimation.[13] Under these circumstances, Western Union's alternative contention—which is not even mentioned in the Government's brief—clearly does not impede review on certiorari of the ground actually adopted by the FCC and the lower court.

Western Union also asserts (pp. 8-9) that it will be disadvantaged if the tariffs are applied to it and it must obtain facilities on the same basis and rates

[12] The directive occurred in the FCC's letter of October 4, 1973, described at AT&T Pet. 15-16 and quoted in pertinent part by the FCC itself at Pet. App. 21b.

[13] The FCC asserted in its decision (Pet. App. 34b) that Section 214(a), 47 U.S.C. § 214(a), among other statutory provisions, supported its *jurisdiction* to review claims respecting the Western Union contracts; but it based its rejection of the tariffs on the express ground that they were inconsistent with the pre-existing contracts. Pet. App. 35b-40b.

as the specialized carriers. What it ignores is that, if the tariff provisions do apply to it equally with other carriers, it is entitled to have the tariffed services provided at just and reasonable rates, terms and conditions, and there is a range of statutory remedies to assure that it receives this treatment. See Sections 201-05 of the Act. Western Union's *ad hoc* arguments in this vein are no different than those made by the shipper in the *Armour* case for maintaining the existing contracts, arguments which this Court firmly rejected as inconsistent with the statutory plan. 209 U.S. at 81-82.

Finally, Western Union (p. 19), joined by Southern Pacific (p. 11), endeavors to suggest that the legal issues presented by the tariff rejection are somehow less significant because the contracts involved are likely to expire in three more years. The fact is that there are literally dozens of intercarrier agreements made by carriers providing telecommunications services; and the FCC's drive toward requiring the tariffing of intercarrier arrangements (AT&T Pet. 15-16) assures that the issue raised here will be a recurring one. Thus, the present case, even apart from its own importance, is an apt occasion for resolving the dispute whether in such situations the *Armour-Cincinnati* or the *Mobile* line of authority governs under the Communications Act.

CONCLUSION

For the reasons stated above and in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Excerpts (paras. 32-41 and Attachment A) from Bell System Brief, January 21, 1974, submitted in FCC Docket No. 19896.

B. *Interconnection as Urged by MCI Would Result in Serious Technical, Operational and Economic Harm to the Public*

32. If the interconnection of services being sought by MCI is required, there will ensue a number of serious technical, operational and economic consequences. These consequences will impact upon the quality of the interstate network and ultimately upon the service and rates to the telephone-using public. In view of the serious nature of these consequences, and in view of the requirements of § 201(a), it is incumbent that there be a full evidentiary hearing so that the Commission may have sufficient information by which to make a reasoned judgment on the question of whether the interconnection being urged by MCI is in the public interest. As stated in the Petition filed herein by the Bell System companies, dated January 11, 1974, some of the factual issues associated with the urged connection which require consideration on an evidentiary record are as follows:

(a) The extent to which physical connection with MCI would involve direct connection into the central offices of the Bell System companies and remove insulation of the network from operations in the MCI system which may be defective.

(b) The extent to which such physical connection would involve specialized carriers in the network management function of the telephone companies and the effects on the telephone-using public.

(c) The effect of such physical connection as requiring specialized planning, engineering and circuit design, as well as controlled implementation, seg-

mented operation, divided maintenance responsibility and complex administrative procedures.

(d) Whether such physical connection would cause technical problems in sectionalizing trouble and initiating remedial steps for outages, thus causing a commitment of substantial resources for manpower, hardware and test equipment not currently required for existing FX and CCSA service provided by AT&T with its connecting, concurring and other participating carriers.

(e) The possible disruption of planning by the Bell System Companies for continuity of telephone network services, which encompass facility restoration over paralleling routes, portable units to replace microwave stations and towers demolished by disaster, redundancy of critical equipment units and the application of important network management techniques to maintain service performance during impaired service conditions.

(f) Creation of major problems such as potential degradation of service to Bell System customers; added costs of manpower, training, and test equipment; and other problems arising from the provision of physical connections as now sought by the specialized carriers.

(g) The detrimental effect on network planning, which planning requires engineering, economic and operational rules and procedures for managing complex networks.

(h) The extent to which proposals for physical connection with MCI would involve MCI in through services with the Bell System companies and the consequences of such arrangements.

(i) The economic penalty which would be imposed on the users of services of the Bell System by diver-

sion of services such as CCSA and FX from Bell System companies to other carriers and resultant further cross-elastic effect and division of MTS revenues.

(j) The cost to the public that would result from the inefficiencies and operational problems of granting other carriers additional types of interconnection, such as for CCSA and FX.

These issues have not been heard, much less resolved, and at the required evidentiary hearing the Bell System companies would be prepared to present evidence along the lines of the discussion which follows, to demonstrate that the proposed connections are not in the public interest.

33. The Bell System companies are prepared to demonstrate that the Bell switched interstate network is a highly complex single entity composed of thousands of facilities and switches and millions of terminal devices, all interacting so that the entire system works as a whole, and not as an assembly of parts. Over many decades, the Bell Companies have developed a vast body of engineering and operating procedures that make it possible to engineer and operate this nationwide network as a joint enterprise. As a consequence, there exists presently a vast and smoothly working nationwide switched telecommunications system which is unequaled anywhere in the world.

34. At the present time, it is the responsibility of the Bell System to plan, engineer, maintain and operate this interstate network and to insure that all portions are adequately engineered and sized to provide swift, efficient and reliable end-to-end service at reasonable rates to the users.* The combining of transmission facilities and

* There are differences in Bell's providing interstate services jointly with independent telephone companies as contrasted with interconnection with MCI. The Bell System associated companies have extensive responsibility for planning and work closely with each of the independents in developing and implementing uniform

switching machines provided in part by the Bell System companies and in part by MCI and possibly a number of other suppliers into an effective, smooth-functioning, low-cost telecommunications network would be economically and practicably unobtainable. The technical and administrative problems in sectionalizing trouble and initiating remedial steps in a fragmented network would require the Bell System companies to commit substantial resources for manpower, hardware and test equipment not currently required for providing existing services, including FX and CCSA services. With divided control and disjointed responsibility for overall FX and CCSA services, special testing and maintenance procedures would be required to work at a number of interfaces with MCI, and perhaps many other carriers. Detailed data regarding harm and the required remedial efforts would be developed at an evidentiary hearing.

35. In addition, the Bell System companies would demonstrate that facility failures on the MCI-provided portion of the network could seriously impact the service of Bell CCSA and FX customers and of the public message network users. Failure of MCI provided services could create congestion on the telecommunications network as users attempted to reach locations beyond the point of failure. This results from the fact that message network users share switching and common control equipment with FX and CCSA users at a number of locations. Such sharing is an efficient and economical way to handle services of these types under normal operating conditions. Network dynamics, however, dictate prompt, remedial ac-

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engineering and operating standards. The independents generally concur in AT&T tariffs and are parties to agreements with Bell by which revenues are shared in accordance with the costs incurred. In this respect they are participants with Bell in the joint operation, and are partners with the Bell Companies, not competitors. Joint arrangements work satisfactorily among partners, but not among competitors.

tion when equilibrium is disturbed. This factor is inherent in Bell planning for continuity of network services, which encompasses facility restoration over paralleling routes, portable van-mounted units for completely replacing demolished microwave stations and towers, redundancy of critical equipment units and the application of sophisticated network management techniques for minimizing impact and maximizing performance during impaired service conditions. Since MCI does not have the capability to provide restoration, a failure of an MCI-provided facility which had been introduced into the middle of this dynamic complex, followed by a failure of that facility, could have a devastating effect on the service of customers who have nothing in common with MCI customers except the sharing of switching and common control equipment. Segmented provision of the network could, in addition, be a deterrent to technical and operating innovations. Employment of rapidly developing technology to effect improvements benefiting all FX and CCSA customers could be impeded by either the inability or the unwillingness of some suppliers to make concurrent capital expenditures in the portions of the network provided by them.

36. The technical and operation harm to the interstate network, resulting from the participation by MCI in the provision of FX and CCSA services would, in turn, result in significant and serious economic harm to the Bell System companies and their customers.* Much added expense would be incurred in combating the operational deficiencies described above, as well as from the additional engineering and construction efforts required to meet the needs of MCI and to make the services function properly on an end-to-end basis.

37. While it is difficult to quantify with particularity the economic impact associated with the technical and

* Additional examples of technical and operational harm from the connections proposed by MCI are shown in Attachment A hereto.

operational detriments which would be caused by MCI, costs would be substantial and would continue so long as the proposed connection were required. The Bell System network is, as has previously been discussed, jointly planned, engineered and operated so as to provide all services on an end-to-end basis. This requires a joint effort of all of the companies in predicting traffic, planning facilities, engineering the services, and constructing the network. Usually, this is done several years in advance of providing service. This is a time-consuming and complex effort. The Bell System companies' evidence will demonstrate that with MCI participating in the provision of services, such as FX and CCSA, the Bell System would be required to expend additional engineering effort to make the services function properly on an end-to-end basis, being hampered by the lack of adequate information and nonstandardized equipment. This in turn raises the question of how the Bell System companies would be compensated for the additional engineering expense incurred on behalf of MCI. Certainly there is no evidence before the Commission to resolve such questions.

38. In addition, the Bell System companies test one another's facilities and are reimbursed through the Division of Revenues procedure for the efforts in behalf of the partnership. The evidentiary showing will demonstrate that this is neither practical nor contemplated in any interconnection with MCI, and MCI does not propose to want such joint operation. Thus, it will be necessary for each carrier to test and operate its own facility; yet, such a segmented arrangement cannot work with divided responsibility. We know of no way that MCI can test the service it will provide without disrupting Bell System services or involving Bell System manpower and test equipment at the interface and quite possibly in the MTS network. The resulting costs would be large.

39. The evidentiary showing would also indicate that technical information and procedures would be required

which would specify such parameters as transmission levels, noise limits, bandwidth, protective criteria, and signaling arrangements for the various facility segments involved. The documentation of such procedures could not be prepared before agreement was reached concerning which carrier would provide each unit of equipment. Also, operating procedures would be required which would delineate the procedures by which operational tests would be conducted through the interconnection segments and the responsibilities of each carrier involved. Administrative procedures would be required to describe the procedures by which each company would start, rearrange and disconnect services; they would also be needed to specify how and where forecasts of requirements could be made. The expense involved in reaching and implementing these procedures would be large. We would, of course, be prepared to make a complete showing of this economic effect at the evidentiary hearing.

40. At a hearing, moreover, evidence would be provided to show that there would be significant market diversions from the Bell FX and CCSA services as well as the MTS and WATS services, if the proposed interconnection is required, resulting in lost revenues and idle facilities. This economic harm will necessarily be reflected in higher rates to all Bell System customers. The Commission must, therefore, resolve such issues in order to determine whether the requested interconnection and the resultant economic harm is in the public interest—not just in the interest of MCI.

41. Thus, if the connections for FX and CCSA now sought by MCI were to be required, serious operational, technical and economic effects would ensue. The result would be added cost to the public in substantial amounts. Such connections should not be required. In any event, an evidentiary hearing under § 201(a) is required to explore these facts thoroughly before any such connection may be ordered.

ATTACHMENT A

Some Specific Examples of Technical and Operational Harm Which Would Result from Connections Proposed by MCI

If MCI were to provide a portion of Bell System FX and CCSA services, serious technical and operational problems would result. These problems would result in disruption and degradation of these services and would cause additional costs and expense which must be borne by all users of the interstate network. A discussion of some specific problems follows.

FX service is a combination of switched local exchange telephone service and a private line interexchange channel which allows a customer physically present in one exchange to have subscriber local exchange service in a distant exchange. FX service in not, however, point-to-point private line service. Rather, it is a direct connection into the switched message telecommunications network, and therefore, is inextricably bound into and will directly impact upon the operation of the MTS service.

CCSA, similarly, is a switched private line service designed for those users having communications requirements large enough so that it is economical for them to have their own private switched networks. It employs common control central office switching machines to interconnect and switch private line circuits. This switched network consists of a substantial number of switches, access lines from customer premises to these switches, and trunks connecting the switches together. Although the private line circuits furnished in CCSA are provided for the exclusive use of the CCSA customer, the switching machines are shared with MTS, WATS and other private line customers and therefore CCSA service has an equally important potential for impacting on the operation of the MTS service as FX service.

If the FX and CCSA services are to operate properly, each must be maintained and operated as one system under a single set of standards. Standardization of signaling, operational and transmission parameters is important in a common user network because of the millions of possible combinations of circuits that will be regularly linked together to provide an end-to-end communications path. However, MCI has stated that it will not provide a joint service. With the introduction of MCI's separately devised standards in the network, impairments will affect all users of the service. Technical parameters such as frequency response, line balance, level equalization, delay equalization and noise must be standardized and controlled in order to prevent these problems. Signaling incompatibilities would result in service impairment to MCI's customers. These incompatibilities can cause mutilated digits and timing errors, which would affect the commonly used switching machine and possibly deny serice to other users.

The procedures for operating and testing a Bell System FX or CCSA service are quite different from those required by the MCI interconnection. The Bell System companies test one another's facilities and are reimbursed through the Division of Revenues procedure for the efforts on behalf of the partnership. This is neither practical nor contemplated by MCI in its proposed interconnection. Since MCI may utilize different maintenance objectives, overall tests—which evaluate distortions introduced by both carriers' facilities—will not be meaningful. For example, although each carrier's facility may meet the respective carrier's design and maintenance objectives the overall test result may not meet necessary standards for satisfactory nationwide network performance. Accordingly, MCI will cause either poor performance or wasteful operational effort and expense.

Even with duplicative testing and maintenance efforts, serious harm may still result by reason of MCI's partici-

pation in the provision of these services. When a facility route fails, its circuits initiate switch operations similar to simultaneous call attempts to the machine. This would tie up all of the common equipment in an average sized switching office. This would, in turn, prevent customers from completing calls through the switching machine. A natural reaction of these customers would be to try to call again. This would in turn cause more ineffective attempts to complete the call. Any telephone user in any part of the United States who was trying to complete a call which routed through the impacted switching machine would not complete the call. A snowballing effect would take place—by the frustrated customers trying to complete their calls again and again—pouring more and more attempts into the machine. This would completely tie up the machine. When this happens, the machine fails to switch any calls, due to the busy common control equipment. Thus, the failure of an MCI facility where there is no possibility of prompt restoral on alternate routes could adversely affect the service of customers who have nothing in common with MCI customers except that they share a switch and common control equipment. Ultimately, this might require the installation of additional switching capacity at considerable cost to the public.

Divided provision of the network facilities could also be a serious deterrent to technical and operating innovations as a result of the inability or the unwillingness of MCI or other specialized carriers to make concurrent capital expenditures in the portions of the network provided by them. For example, the major switching technology used today for CCSA is based upon electro-mechanical devices and expansion of CCSA features is therefore somewhat limited. In order to meet the needs of the future, the Bell System plans to convert to Electronic Switching System technology. Implementation of the Bell System No. 4E Electronic Switching System (ESS) is expected within a few years. This will be a high capacity switch capable of

serving MTS and specialized services. Along with the new switching system, it is planned to introduce a Common Channel Inter-Office Signaling system that will use separate data channels for high speed signaling and improved network control. These innovations may be denied to CCSA customers if the CCSA networks are provided by a number of carriers each motivated by its own interests and not working toward the same goals.